Supreme Court, U.S.
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NO.

In The
Supreme Court of the United States

GROVER LEE BREEDING,

PETITIONER,

v.

THOMAS MCBRIDE, WARDEN
MT. OLIVE CORRECTIONAL COMPLEX, AND
STATE OF WEST VIRGINIA,

RESPONDENTS.

Petition for Writ of Certiorari
to the Supreme Court of the United States

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Mr. Breeding's counsel failed to obtain his psychiatric records for review and consideration by the evaluating psychiatrist and sentencing court, was unprepared at trial, and failed to investigate or present mitigating evidence or to assert a defense based on Mr. Breeding's lack of mental capacity. Trial counsel failed to even request a mental competency hearing. Did Mr. Breeding receive ineffective assistance of counsel?

2. Mr. Breeding was heavily medicated by the State at the time of the trial. His psychiatric records establish a long history of mental illness and heavy medication. Was he mentally incompetent to assist in his own defense, or even to stand trial at all?

3. Mr. Breeding's psychiatric records reveal that he was on medication at the time of the crime, and that he did not even remember it. Did he lack mental capacity at the time of the crime?

4. The state interviewed Mr. Breeding without providing his counsel with notice or an opportunity to attend. Should evidence illegally obtained in that interview have been excluded?

5. Mr. Breeding was sentenced to 75 years of incarceration for robbery, receiving a sentence for a nonviolent crime that exceeds sentences imposed for murder. Was the sentence here excessive or disproportionate to the crime?

STATEMENT OF THE BASIS FOR JURISDICTION

Pursuant to Rule 14(e) of the Supreme Court Rules, Mr. Breeding provides this Statement of the Basis for Jurisdiction. S. Ct. R. 14(e).

(1) The judgment sought to be reviewed was entered on October 31, 1996.

(2) The statutory provisions believed to confer on this Court's jurisdiction to review the Order in question on a Writ of Certiorari include:

W. Va. Code § 53-4A-1 for Writ of Habeas Corpus

28 U.S.C. § 2254(a) (1996)

U.S. Const. amends. VI, VIII, XIV

W. Va. Const. art. III, §§ 5, 10, 14

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The text of the following Constitutional provisions and statutes is set forth in full in the attached Appendix:

U.S. Const. amends. VI, VIII, XIV

28 U.S.C. § 2254(a) (1996)

U.S.S.G. § 6A1.1

W. Va. Const. art. III, §§ 5, 10, 14

W. Va. R. Crim. P. 32(b)(2)

W. Va. Code § 27-6A-1

W. Va. Code § 27-6A-2

W. Va. Code § 53-4A-1

W. Va. Code § 62-12-13

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STATEMENT OF THE CASE

A. Overview And Background.

In this Petition for a Writ of Certiorari (the "Petition"), Mr. Breeding seeks relief from the 75-year sentence he received from the Putnam County, West Virginia Circuit Court on October 31, 1996 for a single count of aggravated robbery. (A-38.) He has identified five grounds for relief from this sentence:

1. Ineffective Assistance of Counsel;
2. Mental Incapacity to Stand Trial;
3. Mental Competency at Time of the Crime;
4. Erroneous Presentence Report;
5. Excessive Sentence.

Mr. Breeding was denied substantial constitutional and fundamental rights in each category; he was the victim of harmful constitutional error; and but for those errors and deprivations of rights, he would not be incarcerated for so long—if at all. In support of the Petition, Mr. Breeding submits the attached Appendix of documents from the record below pursuant to Supreme Court Rule 14(i). He respectfully requests any and all relief available to him, including his release, sentence reduction, and any other relief to which he may be justly entitled.

B. The Underlying Crime.

On November 27, 1995, at approximately 12:15 A.M., a white male entered the 7-11 store located on Route 35 at Scary Hill in Putnam County and presented a firearm

to the store clerk. He fled after forcing the clerk to empty the cash register and ordering him to return to the back of the store. The clerk later identified Mr. Breeding in a photo array as the man who had robbed the store.

C. The Psychiatric Evaluation.

On June 25, 1996, Mr. Breeding was evaluated by Dr. Daniel B. Thistlethwaite, M.D. (the "Evaluating Physician"), who opined that he was competent to stand trial as well as during the crime. (A-73.) Notwithstanding the brevity of the Evaluating Physician's meeting with Mr. Breeding, his conclusions would have been better informed had he had the opportunity to review Mr. Breeding's previous psychiatric records. (*See* Psychiatric Report at 6.)

D. Mr. Breeding Was Heavily Medicated While In Custody.

During his incarceration and trial, Mr. Breeding was medicated by the jail staff with mood-altering drugs including Mellaril 15 mgs, Desyrel 50 mgs, and Prozac 20 mgs. (Psychiatric Report at 3.)

E. Mr. Breeding Was Interviewed Without Notice To, Or Presence Of, His Counsel.

Before sentencing, the trial court's probation officer interviewed Mr. Breeding without his counsel's presence and without even notifying him of the interview. During that interview, Mr. Breeding made a statement regarding the crime.

F. Mr. Breeding's Conviction And Excessive Sentence.

Mr. Breeding was convicted of aggravated robbery after a one-day trial in Putnam County, West Virginia before Judge O.C. Spaulding, who sentenced him to 75 years in prison.

G. Mr. Breeding's Appeal Attempts.

The issues here were raised at several stages in the proceedings below. Mr. Breeding's initial appeal was denied by the West Virginia Supreme Court of Appeals on July 11, 1997. On August 31, 2001, he again sought relief from his unconstitutional incarceration based on ineffective assistance of counsel, incapacity to stand trial because of mental incompetence, erroneous presentence report, mental incompetence at the time of the crime, and the imposition of an excessive sentence. (A-175.) The transcript from the Omnibus Hearing conducted on April 1, 2002 (A-112), confirms Mr. Breeding's contentions regarding his mental illness (Tr. at 6), ineffective assistance of counsel (Tr. at 9), and sentencing report information obtained during an interview conducted without notice to his counsel. (Tr. at 11-12). The record also establishes the existence of mitigating evidence. (Tr. at 128.) (A-110.)

Mr. Breeding next appealed to the trial court on May 30, 2002, seeking a Writ of Habeas Corpus from the Putnam County Circuit Court, which was denied on June 10, 2002. (A-24.) In November 2003, he filed an Amended Petition under West Virginia Code § 53-4A-1 for a Writ of Habeas Corpus. (A-99.)

Finally, Mr. Breeding sought a writ of *habeas corpus ad subjiciendum* from the West Virginia Supreme Court of Appeals, which was denied on March 14, 2007. (A-23.) From that decision, Mr. Breeding now appeals.

ARGUMENT AND AUTHORITIES

I. GENERAL REASONS TO GRANT THE PETITION.

This Petition should be granted because the state court of last resort has decided an important issue conflicting with a United States Court of Appeal. Specifically, the Ninth Circuit Court of Appeals has expressly held that "probation officers must permit defendants to have their attorneys present at the presentence interview." *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1433 (9th Cir. 1991). Here, Mr. Breeding's due process rights were violated when the probation officer refused to permit his counsel's attendance at the presentence interview.

Additionally, habeas relief is available under state and federal law where there has been a constitutional violation, and as will be discussed in greater detail below, numerous state and federal constitutional violations have occurred here. *See Pethel v. McBride*, 219 W. Va. 578, ___, 638 S.E.2d 727, 740 (2006). Finally, the decisions below were contrary to precedent by this Honorable Court.

II. THE SENTENCE CONFLICTS WITH STATE AND FEDERAL LAW REGARDING EXCESSIVE SENTENCING, INEFFECTIVE ASSISTANCE OF COUNSEL, MENTAL CAPACITY TO COMMIT A CRIME OR TO STAND TRIAL, AND ILLEGALLY OBTAINED PRESENTENCE REPORT IN DENIAL OF DUE PROCESS.

1. Ineffective Assistance Of Counsel At Trial.

Mr. Breeding's trial counsel failed to obtain records from a psychiatric hospital that would have presented mitigating evidence and facilitated a thorough evaluation of his mental state, given his long history of mental incompetence.

(a) Missing Records Prevented a Thorough Mental Assessment.

The missing records would have enabled the evaluating psychiatrist to make a more informed evaluation of competency at the time of the crime by examining in detail Mr. Breeding's long history of mental incompetence. Also, Mr. Breeding's counsel failed to sustain a reasonable level of investigation into his medical records that would have showed a mental ailment and/or diminished mental capacity.

(b) Trial Counsel's Lack of Preparation Impacted His Trial Presentation as well as Defenses Available to Mr. Breeding.

Mr. Breeding's counsel appeared at trial extremely nervous and confused as a result of being unprepared for

trial—and his lack of preparation and diligence were apparent in his lack of sound trial strategy.

Furthermore, trial counsel failed to demand a competency hearing to determine whether Mr. Breeding was competent at the time the crime was committed. As a result, he employed a peculiar trial strategy, trying to proceed on a competency claim but dropping that defense because of a lack of evidence of Mr. Breeding's history of mental illness. The combination of these circumstances resulted in Mr. Breeding having an undeveloped defense and no mitigating evidence, which had a serious and injurious effect on the outcome of his trial.

(c) Counsel's Ineffectiveness Prejudiced Mr. Breeding Under West Virginia Law.

The West Virginia Supreme Court of Appeals has articulated the test to determine whether an accused was prejudiced by ineffective assistance of counsel:

> Courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law[.]

State v. Thomas, 157 W. Va. 640, 665, 203 S.E.2d 445, 461 (1974). Additionally:

> In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the

> identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

State v. Miller, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995). Permitting the sentence to stand here would fly in the face of this precedent.

(d) Counsel's Ineffectiveness Prejudiced Mr. Breeding Under This Court's Precedent.

This Honorable Court also has addressed the standard to be used in assessing ineffective assistance claims, establishing a two-prong standard to determine ineffectiveness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 697-98, 104 S. Ct. 2052, 2064-65, 2070, 80 L. Ed. 2d 674 (1984). First, a petitioner must show that trial counsel's performance was deficient in specific instances and did not rise to the standard of the reasonably competent criminal attorney. Here, notwithstanding the inadequate investigation in failing even to obtain Mr. Breeding's psychiatric records, his trial counsel's failure even to request a competency hearing—to which Mr. Breeding was entitled under state law—clearly demonstrated ineffective assistance. Second, a petitioner must show that trial counsel's deficient performance caused him prejudice such that the outcome otherwise would have been different. Here, the failure to obtain mitigating evidence or to pursue a defense based on

mental incompetence clearly caused Mr. Breeding prejudice, as evinced by his incarceration for 75 years for a nonviolent robbery.

(a) Ineffective Assistance Through Ineffective Investigation, Failure to Obtain Psychiatric Records, and Failure to Present Mitigating Evidence.

Mr. Breeding's trial counsel failed to exhibit the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law. Mr. Breeding clearly was prejudiced by ineffective assistance of counsel.

(i) Failure to Obtain Mr. Breeding's Psychiatric Records.

Mr. Breeding was prejudiced at trial by his counsel's lack of investigation and failure to obtain his psychiatric records for review by the evaluating physician whose report strongly impacted not only his sentence, but his being construed as being mentally competent to stand trial or to have committed the crime charged.

Mr. Breeding has a long history of psychiatric illness. He had been treated as an inpatient at a psychiatric hospital in Chicago; but those records were not presented to the Evaluating Physician for review. (*See* Psychiatric Report.) The Evaluating Physician indicated in writing his understanding that Mr. Breeding's records were to come from the trial court. (A-179.) The court, in turn, made clear that providing Mr. Breeding's records was his trial counsel's responsibility. (A-179.) Nevertheless, Mr.

Breeding's records never were secured or provided to the Evaluating Physician.

Mr. Breeding's trial counsel's lack of investigation and his failure to obtain his psychiatric records prejudiced his defense. Had his counsel obtained his prior medical and psychiatric records, Mr. Breeding could have pursued a more viable defense than simply weakness in the photo identification. The medical records could have indicated a strong diminished capacity argument, and thus constituted important mitigating evidence.

The West Virginia Supreme Court has recognized that medical records reflecting treatment for mental diseases are material to determining the question of defendant's competency to stand trial. *State v. Milam*, 159 W. Va. 691, 700-01, 226 S.E.2d 433, 440 (1976); *cf. State v. Parsons*, 214 W. Va. 342, 355, 589 S.E.2d 226, 239 (2003) (failure to consider therapy records was not error where records did not contain any novel information that would have impacted trial outcome).

The West Virginia high court expressly has acknowledged the probative value of using and referencing prior medical history and records by a psychiatrist in making a psychiatric diagnosis of one charged with a criminal offense, concluding that the failure to consider such evidence is grounds for setting aside a conviction. *Milam*, 159 W. Va. at 700-01, 226 S.E.2d at 440 (reversing judgment, setting aside guilty verdict, and ordering new trial).

(ii) Ineffective Pretrial Investigation.

Mr. Breeding met only once with the private investigator employed by trial counsel. His trial counsel failed to inform him of any results of the investigation, and this lack of information forced Mr. Breeding to make uninformed tactical trial decisions.

The "fulcrum" for an ineffective assistance of counsel claim is the adequacy of counsel's investigation; there is "little difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation, nor demonstrated a strategic reason for failing to do so." *State ex rel. Myers v. Painter*, 213 W. Va. 32, 36, 576 S.E.2d 277, 281 (2002) (reversing convictions where defense counsel rendered ineffective assistance); *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 153, 469 S.E.2d 7, 12 (1996) (granting writ where counsel's decisions were not based on adequate or reasonable investigation); *State ex rel. Bess v. Legursky*, 195 W. Va. 435, 440-41, 465 S.E.2d 892, 898 (1995) (reversing conviction based on constitutionally ineffective assistance of counsel; noting that counsel "must at a minimum" conduct reasonable investigation enabling him to make informed decisions about client representation); U.S. Const. amend. VI; W. Va. Const. art. III, § 14.

Mr. Breeding clearly was prejudiced by his counsel's lack of pretrial investigation, warranting a new trial, reversal, or setting aside the sentence.

(iii) Ineffectiveness at Trial.

Mr. Breeding's trial counsel was unprepared for trial, as exhibited by his unpreparedness, nervousness, fear, inattentiveness, cracking voice, and fumbling with papers. Upon observing his counsel's lack of preparedness, Mr. Breeding's confidence was shaken, forcing him to accept poor advice.

Additionally, the strategic decisions (or lack thereof) regarding a competency defense, or even requesting a competence hearing, and the failure to obtain Mr. Breeding's psychiatric records for the Evaluating Physician's prereport, review deprived Mr. Breeding of significant materials that would have assisted his defense. *State ex rel. Humphries v. McBride*, No. 33103, 2007 WL 1201056 (W. Va. Apr. 19, 2007) (not yet released for publication) (reversing order denying petition of writ of habeas corpus and remanding for retrial based in part on ineffective investigation and strategic decisions involving failure to introduce evidence that might have assisted defense).

(iv) Ineffectiveness at Sentencing.

The lack of investigation also prejudiced Mr. Breeding at sentencing. Had his counsel obtained his prior psychiatric records, the trial court could have reviewed a plethora of evidence indicating numerous psychiatric problems. In his report, the Evaluating Physician noted that Mr. Breeding was experiencing psychotic depression including paranoia, auditory hallucinations, and thoughts of suicide at the time. (Psychiatric Report at 4.)

(v) Ineffectiveness in Failing to Provide Mitigating Evidence.

Mr. Breeding's prior psychiatric records would have impacted this evaluation, as well as providing a mitigating effect on the sentence, since defendants suffering from mental illness often are not sentenced as harshly as those without mental illnesses, because our civilized society attempts to treat those with mental illness that may have affected their culpability in a crime differently than those without an illness. Accordingly, Mr. Breeding was prejudiced during sentencing by being deprived of the opportunity to present mitigating evidence.

Counsel's failure to investigate and consequent failure to introduce important evidence or to assert a valid defense can constitute ineffective assistance. *State v. Glover*, 183 W. Va. 431, 434, 396 S.E.2d 198, 201 (1990) (reversing 75-year sentence for aggravated robbery; ineffective assistance established when counsel failed to investigate purported alibi defense).

(vi) Counsel's Overall Ineffectiveness Prejudiced Mr. Breeding.

Considering the extent and magnitude of trial counsel's errors, it is probable that without them, Mr. Breeding would not have been convicted at all—much less sentenced to 75 years of imprisonment for a single robbery count. Accordingly, trial counsel's ineffective assistance was prejudicial to Mr. Breeding, affecting the outcome of the case, which cannot be regarded as harmless error. Such ineffective assistance violates Mr.

Breeding's right to a fair trial under the state and federal constitutions. W. Va. Const. art. III, § 10; U.S. Const. amend. XIV (Due Process).

The circumstances described above confirm that Mr. Breeding received ineffective assistance of counsel. His counsel's representation fell below an objective reasonableness standard, resulting in prejudice that rendered the trial results unreliable.

(b) Ineffective Assistance Through Failure to Obtain a Competency Hearing and Secure an Expert Witness.

Mr. Breeding's counsel's ineffectiveness was further demonstrated by his failure even to schedule a hearing to determine whether further psychiatric evaluation was merited to build a defense.

The West Virginia Code provides:

> The defendant shall have the right to an examination by an independent expert of his or her choice and testimony from such expert as a medical witness on his or her behalf[.]

W. Va. Code § 27-6A-2(a) (Hearing on Competency to Stand Trial).

Unless a competency hearing is requested by a criminal defendant who has been previously examined, the right to request such a hearing is waived. *See id.* § 27-6A-1; *State v. Barrow*, 178 W. Va. 406, 411, 349 S.E.2d 844, 849 (1987) (reversing conviction where elicitation of

statement without counsel's presence violated his Sixth Amendment rights). Thus, trial counsel's failure to explore this avenue of assistance or to investigate Mr. Breeding's competence amounts to further ineffective assistance of counsel. Even if the failure to request a competency hearing is not per se ineffective assistance, it is more evidence that counsel's cumulative errors had a significant impact on the outcome of, and sentence after, the trial. *See, e.g., Morris v. Painter*, 211 W. Va. 681, 682-83, 567 S.E.2d 916, 917-18 (2002) (reversing conviction where procedure utilized by trial court to find defendant competent to stand trial was insufficient to protect his due process rights).

"Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *State v. Sanders*, 209 W. Va. 367, 377, 549 S.E.2d 40, 50 (2001) (citation omitted); (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 1376-77, 134 L. Ed. 2d 498 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-40, 112 S. Ct. 1810, 1817-18, 118 L. Ed. 2d 479 (1992) (Kennedy, J., concurring))). As a result of the emphasis placed on an accused's ability to muster an adequate defense at trial, the minimal threshold for competency requires that a defendant have both "'a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,'" and "'a rational as well as a factual understanding of the proceedings against him.'" *Sanders*, 209 W. Va. at 377, 549 S.E.2d at 50

(quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824 (1960) (per curiam)).

The failure to direct additional inquiry into a defendant's mental competency at the close of trial "presumptively" violates his due process rights, particularly where he suffers from serious mental illness. U.S. Const. amend. XIV; W. Va. Const. art. III, § 10; *Sanders*, 209 W. Va. at 377, 549 S.E.2d at 50.

Accordingly, Mr. Breeding's Petition should be granted on the basis of ineffective assistance of counsel alone.

2. Mental Incapacity To Stand Trial.

This Honorable Court has held that "the conviction of an accused person while he is legally incompetent violates due process." *Bishop v. United States*, 350 U.S. 961, 961, 76 S. Ct. 440, 440, 100 L. Ed. 835 (1956) (vacating judgment and granting remanding for hearing on sanity at time of trial). Mr. Breeding was incompetent to stand trial, based on his mental incapacity resulting from drugs that were administered to him while he was in custody.

During trial, Mr. Breeding was under several prescribed medications (Mellaril, Desyrel, and Prozac) for his mental illness and depression that left him oblivious to what was going on during his trial. His inability to understand what was happening during his trial left him unable to work with his counsel or to protect himself against his counsel's ineffective assistance, resulting in the waiving of competency. Evidence of Mr. Breeding's long history of mental illness would have been mitigating

factors to his defense. The failure to present such evidence was highly prejudicial, resulting in a serious and injurious effect on the outcome of Mr. Breeding's trial.

(a) Drugs Administered While Mr. Breeding Was in Custody Rendered Him Unable to Participate in His Own Defense.

Due to his mental illness and the behavior-modifying drugs prescribed and administered by the jail, Mr. Breeding was unable to participate in or assist with his own defense. Specifically, during trial, he was medicated with Mellaril (15 mgs), Desyrel (50 mgs), and Prozac (20 mgs) daily. (*See* Psychiatric Report at 3.)

(b) The Drugs Administered to Mr. Breeding Were Mind-Altering Drugs with Serious Side Effects that Compromised His Ability to Participate, or Understand What Was Happening, At His Trial.

All of the drugs administered to Mr. Breeding by the State were strong, mind-altering drugs that prevented him from understanding what was happening during his trial. Mellaril, or thiridazine hydrochloride, is an antipsychotic drug administered in capsule, tablet, or syrup form. It blocks psotsynaptic dopamine receptors in the brain. Common adverse reactions include tardy voluntary movements, sedation, and blurred vision. (A-183.) Desyrel, or trazodone hydrochloride, is an atypical antidepressant administered in tablet form. It inhibits serotonin uptake in the brain. Common adverse reactions include drowsiness, dizziness, nervousness,

fatigue, confusion, tremors, and weakness. (A-183.) Prozac, or fluoxetine hydrochloride, is another atypical antidepressant that inhibits the central nervous system's serotonin uptake. Side effects include nervousness, anxiety, insomnia, headache, drowsiness, and dizziness. (A-183.)

Thus, due to the jail's administration of these behavior-modifying drugs and his mental illness, Mr. Breeding was unable to assist with his defense, and, as a result, was mentally incompetent to stand trial. His Petition should be granted on this basis alone.

3. Mental Competency At Time Of Crime.

Mr. Breeding's trial counsel failed to investigate his history of mental illness, waived a mental competency hearing, and then abandoned that defense during trial. This strategic decision (or lack thereof) very likely cost Mr. Breeding his freedom, since his mental illness in combination with intoxication led to his criminal activity, although he lacked intent and therefore was denied due process.

(a) Mr. Breeding Lacked Mental Competence at the Time of the Crime.

On the date of the crime, Mr. Breeding was using multiple medications and illicit substances. As explained to the Evaluating Physician, he had taken fiorieet and soma and consumed beer, whiskey, and marijuana. As a result, he awakened from a blackout and discovered $140 in his possession. (*See* Psychiatric Report at 4.)

Considering his inebriated condition, Mr. Breeding clearly was not competent during the crime. The offense of aggravated robbery is not a strict liability crime, but requires a *mens rea criminis*. Additionally, a mental state of *animus furandi* likewise is required for the crime of robbery to occur. *State v. Plumley*, 179 W. Va. 356, 358, 368 S.E.2d 726, 728 (1988) (reversing aggravated robbery conviction where jury was not fully instructed regarding mental state required to support conviction).

(b) Mr. Breeding Lacked the Intent Required to Support His Conviction.

The law in West Virginia makes clear that Mr. Breeding could not form the required intent when he was inebriated, and he should not be held accountable for acts he committed while he was incompetent. *State v. Bias*, 177 W. Va. 302, 313, 352 S.E.2d 52, 63 (1986) (certifying questions regarding ability to try defendant found incompetent to stand trial; noting that state must show that accused suffered no substantial prejudice beyond ordinary delay attendant to attaining competency); *Milam*, 159 W. Va. at 698-99, 226 S.E.2d at 439 (reversing conviction; trial court's refusal to grant competency hearing on request was abuse of discretion); *State v. Swiger*, 175 W. Va. 578, 584, 336 S.E.2d 541, 547-48 (1985) (reversing conviction based on erroneous finding of competency to stand trial).

Mr. Breeding was denied due process of law because he was tried and convicted for a crime he committed while lacking the requisite mental capacity. Had his counsel requested a competency hearing, the denial of a hearing would have been an abuse of discretion—and

without it, his mental competency to stand trial simply was not established here, as required. Accordingly, Mr. Breeding's trial without a mental competency determination flies in the face of existing West Virginia law and principles of Constitutional due process. Accordingly, the Petition should be granted on this basis alone.

4. Erroneous Presentence Report.

The State knew that Mr. Breeding was being represented by counsel, but it nonetheless violated his due process rights by failing to provide notice or an opportunity for his counsel to attend when its probation officer interviewed him. Accordingly, any statements made by Mr. Breeding at that interview were illegally obtained and should have been excluded, rather than having been presented to the trial court prior to sentencing.

(a) Notice and Opportunity to Attend Interview Are Required by State Law.

West Virginia law provides defense counsel the right to notice and an opportunity to attend a defendant's interview by a probation officer during the presentence investigation. W. Va. R. Crim. P. 32(b)(2). However, Mr. Breeding was interviewed by the probation officer without his counsel's presence, which violated his right to representation by counsel at all stages of the proceeding.

Federal authorities have established that due process is violated when a probation officer refuses to permit the

attendance of defense counsel at a presentence interview. The failure to provide notice and an opportunity to attend the interview to Mr. Breeding's counsel here violated the rule articulated nearly two decades ago, that federal courts have established that "probation officers must permit defendants to have their attorneys present at the presentence interview." *Herrera-Figueroa,* 918 F.2d at 1433; U.S. Const. amend. VI; U.S.S.G. § 6A1.1 (Presentence Report); *see also* 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* II-312 (2d ed. 1993).

Here, Mr. Breeding's due process rights clearly were violated when he was interviewed by the probation officer without notice to, or presence of, his counsel. The trial court permitted Mr. Breeding's counsel to redact some portions of the sentencing report—but as acknowledged, "the cat's out of the bag. Where do we go from here. I mean, I've read it." (Tr. at 12.) In other words, once the bell is rung, it cannot be unrung. The trial court already had read the illegally obtained statement before it was redacted. Therefore, this Honorable Court should grant Mr. Breeding's Petition on this ground alone.

5. Excessive Sentence.

The 75-year sentence imposed on Mr. Breeding for robbery is disproportionate for a person with a history of mental illness, it is cruel and inhuman punishment lacking equal protection of law, and it denied Mr. Breeding due process. The sentence is clearly excessive particularly in light of the ineffective assistance of

counsel in failing adequately to pursue any mitigating evidence that would have aided Mr. Breeding's defense.

(a) Both State and Federal Law Require Sentencing to Be Proportionate to Crime.

The West Virginia Constitution provides that "[p]enalties shall be proportioned to the character and degree of the offense." W. Va. Const. art. III, § 5.

Similarly, the federal Constitution also provides that "[e]xcessive bail shall not be required, . . ., nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The trial court violated both the state and federal Constitutions by sentencing Mr. Breeding to seventy-five years for robbery.

(b) Excessive Sentences Constitute Cruel and Unusual Punishment.

This Honorable Court has found that the protection of the Eighth Amendment proscription against cruel and unusual punishment includes sentences that are disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277, 285, 103 S. Ct. 3001, 3006-07, 77 L. Ed. 2d 637 (1983); *see* U.S. Const. amend. VIII; *see also* 2 Cleckley, II-393, *supra*. In *Solem*, this Court held that an Eighth Amendment proportionality analysis should be guided by objective factors including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for committing the same crime in other jurisdictions.

However, before using this complicated test, the West Virginia Supreme Court concluded that rather than analyzing disparity principles as provided by *Solem*, a reviewing court may use a subjective test to determine whether the sentence "shocks the conscience of the court and society." *State v. Cooper*, 172 W. Va. 266, 267-68, 304 S.E.2d 851, 852 (1953).

If, as here, a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.

(c) Mr. Breeding's 75-year Sentence Shocks the Conscience.

(i) Mr. Breeding's Mental History Should Have Been Considered in Sentencing.

The Evaluating Physician's report noted that "[w]ith regard to criminal responsibility, again although Mr. Breeding has a severe and chronic mental illness, it does not appear that this illness impaired his ability to conform his behavior to appropriate social and legal norms." (Psychiatric Report at 5.)

Thus, although Mr. Breeding was held criminally responsible for his actions, the Evaluating Physician recognized and diagnosed his Axis I disorders, including bipolar disorder and depression with severe psychotic features, as well as polysubstance dependence on alcohol, marijuana, and methamphetamines. (Psychiatric Report at 4-5.)

As noted above, the Evaluating Physician's diagnosis was made without having reviewed Mr. Breeding's mental health records, which would have shown other mental illnesses from which he suffers. Based even on just the mental illnesses that *were* revealed—which include chemical dependence, bipolar affective disorder, and severe depression with psychotic features—the seventy-five year sentence shocks the conscience. (*See* Psychiatric Report at 4-5.)

(ii) The Lack of Violence During the Crime Should Have Impacted Sentencing.

Although Mr. Breeding's sentence is sufficient to shock the conscience based solely on his mental illness, the facts surrounding his crime emphasize the lack of proportionality in the 75-year sentence.

The state alleged that Mr. Breeding presented a firearm to a clerk and demanded money and that on receiving the money, he fled the store, without harming the clerk. (A-38.) There was no actual violence during the crime; the sentencing court should have placed significant weight on the fact that Mr. Breeding did not physically harm, or exert physical force upon, the store clerk. Thus, Mr. Breeding's 75-year sentence for robbery shocks the conscience—particularly when one considers Mr. Breeding's chronic mental illness and the lack of actual violence in the commission of the crime. Accordingly, the sentence should be vacated.

When, during the presentence investigation, the probation officer illegally interviewed Mr. Breeding without his counsel's presence, he informed her, "Well, I

really don't know that I would shoot somebody. Probably would just hit them in the head if they refused to give me the money." (A-110.)

(d) The 75-year Sentence, Even If Not Shocking to the Conscience, Is Disproportionate Based on Objective Factors.

A disproportionality challenge is guided by an objective test. *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 531, 276 S.E.2d 205, 211 (1981) (awarding writ of habeas corpus and discharging prisoner where imposition of life recidivist sentence violated constitutional proportionality principle in light of nonviolence during crime and defendant's previous convictions). "In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *Id.* at 537, 276 S.E.2d at 214. The 75-year sentence is clearly disproportionate based on these factors.

(i) The Nature of the Offense.

Although aggravated robbery might be recognized as a crime involving a *potential* for violence, no *actual* violence occurred here. The clerk was presented with a firearm and ordered to hand over money; then Mr. Breeding fled from the store, in a "garden variety"

aggravated robbery. Hence, although the nature of the offense has the potential for violence, there was no *actual* violence. Thus, the nature of the offense is not sufficient to justify a 75-year sentence.

(ii) The Legislative Purpose Behind the Punishment.

The purpose behind the aggravated robbery statute is to deter and punish those who would rob another. Judicial discretion to impose a determinate sentence of ten years to life is not unfettered. A trial judge's discretion, while broad in sentencing for robbery, must be tempered by constitutional requirements that sentences be proportional to the character and degree of the offense. *Cooper*, 172 W. Va. at 267-68, 304 S.E.2d at 852; W. Va. Const. art. III, § 5 (containing express statement of requirement that penalties be proportioned to character and degree of offense).

Thus, the sentencing court must consider mitigating and aggravating circumstances in sentencing. To support imposing a robbery sentence, the sentencing record should include the presentence report and any other diagnostic reports used as an aid in imposing the sentence. Additionally, the sentencing judge shall state on the record his reasons for selecting the particular sentence. *Cooper*, 172 W. Va. at 270, 304 S.E.2d at 855.

Here, the reasons stated by the sentencing court are insufficient to justify a 75-year sentence for the reasons previously argued. Namely, due to Mr. Breeding's mental illnesses and lack of any violence, the sentence is clearly excessive.

(iii) Comparison of the Punishment with What Would Be Inflicted in Other Jurisdictions.

The third factor to be considered in a claim that a sentence is objectively disproportionate to the crime is a comparison of other jurisdictions' sentences for the same crime. The West Virginia Supreme Court has conducted such a study, concluding that a 75-year sentence is substantially longer than the maximum permissible sentence for aggravated robbery in most jurisdictions. *State v. Buck*, 173 W. Va. 243, 245-46 n.3, 314 S.E.2d 406, 409 n.3 (1984) (concluding that in *most* states, the maximum sentence would be less, when considering first offense aggravated robbery).

(iv) Comparison with Other Offenses Within West Virginia.

The final factor to be considered in a claim that a sentence is objectively disproportionate to the crime is a comparison of other offenses within the state. The West Virginia Legislature has provided that a person convicted of aggravated robbery with the presentment of a firearm shall not be eligible for parole prior to serving a minimum of five years of his sentence or one-third of his definite term sentence, whichever is greater. W. Va. Code § 62-12-13. By comparison, someone under a life sentence can become eligible for parole in ten years; thus, it is possible under the robbery open-ended sentencing statute for a defendant actually to serve a longer sentence in terms of years than might be served under a life sentence. Accordingly, imposing a 75-year sentence for robbery imposes a penalty that is unmatched except for

those imposed for first-degree murder, treason, and kidnaping involving bodily injury—and even then only when the jury refuses to recommend mercy. Thus, this case presents an undeniable anomaly whereby punishment for a robbery conviction has been elevated above that which a murderer with a mercy recommendation might receive. *See Wanstreet*, 166 W. Va. at 534, 276 S.E.2d at 212 (awarding writ and discharging prisoner where sentences ranging from two to ten years violated constitutional proportionality principle in light of nonviolent nature of crime).

Since Mr. Breeding injured no one during the crime charged, the 75-year sentence is disproportionate based on objective factors contained in West Virginia common law; therefore, his Petition should be granted and his sentence vacated.

CONCLUSION

For these reasons, Mr. Breeding respectfully requests that this Honorable Court grant his Petition, and either grant him a new trial or vacate his 75-year sentence. Mr. Breeding further prays for any further relief, legal or equitable, to which he may be entitled and that the Court deems necessary, just, and proper.

Respectfully submitted,

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NO.

In The
Supreme Court of the United States

GROVER LEE BREEDING,

PETITIONER,

V.

THOMAS MCBRIDE, WARDEN
MT. OLIVE CORRECTIONAL COMPLEX, AND
STATE OF WEST VIRGINIA,

RESPONDENTS.

Petition for Writ of Certiorari
to the Supreme Court of the United States

Appendix

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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

GROVER L. BREEDING,

Petitioner,

v. **Civil Action No.: 99-C-123**
Judge O.C. Spaulding

HOWARD PAINTER, Warden,

Respondent.

MEMORANDUM OF LAW

Now Comes the Petitioner, Grover Lee Breeding, by counsel, D. Scott Bellomy, and respectfully submits this Memorandum of Law attached to the Amended Omnibus Petition for Writ of Habeas Corpus ad Subjiciendum, which is incorporated herein.

Procedural History

The Petitioner, Grover Lee Breeding, was convicted of the felony offense of aggravated robbery, with a finding that a firearm was used, after a one day trial in the Circuit Court of Putnam County, West Virginia. The Honorable O.C. Spaulding presided over the trial which began and ended October 31, 1996. On the same day the jury returned a verdict of guilty with a finding that a firearm was used in the commission of the crime. Gregory M. Courtright of the firm Collins & Courtright represented the Petitioner at trial and upon appeal.

On the 20th day of December, 1996 the trial court denied the Defendant's motion for a new trial and motion for acquittal. On that same date the trial court sentenced the Petitioner to a determinate sentence of seventy-five years in prison with credit for time served.

On the 18th day of January, 1997 the Defendant filed a notice of intent to appeal. On the 11th day of July, 1997 the Supreme Court of Appeals of West Virginia refused said petition for appeal.

Now the Petitioner seeks a Writ of Habeas Corpus ad Subjiciendum for relief from unconstitutional incarceration because he was denied effective assistance of counsel, because he was incapacitated to stand trial due to drugs administered to him, because an erroneous presentence report was submitted by the court's probation department, because he was incompetent at the time of the crime, and because he received an excessive sentence.

Facts of the Case

On the 27th day of November, 1995 at approximately 12:15 a.m. a white male entered the 7-11 store located on Route 35 at Scary Hill in Putnam County and presented a firearm to Jacob Persinger, the store clerk. **TT pg 10.** The suspect fled after forcing Mr. Persinger to empty the contents of the cash register and ordering him to return to the back of the store. **TT pg 14.**

Subsequently, officers obtained an anonymous tip that the perpetrator of the crime was Grover Lee Breeding. **TT pg 23.** Mr. Persinger was shown a

photographic array that included a photograph of the Petitioner. **TT pg 24.** The witness identified the photograph of the Petitioner as the man that had robbed the store.

On the 25th day of June, 1996, the Petitioner was examined by Dr. Daniel B. Thistlethwaite, M.D., who opined that the Petitioner was competent to stand trial and was competent during the commission of the crime. *(See Psy. Report Attached, Exhibit A).*

During his incarceration and trial, the Petitioner was medicated with mood altering drugs by the jail staff. These drugs included Mellaril 15 mgs, Desyrel 50 mgs, and Prozac 20mgs. *(See Psy. Report Attached, Exhibit A).*

Prior to sentencing, the trial court's probation officer interviewed the Petitioner without his counsel being present or notified of the interview. During that interview the Petitioner made a statement regarding the crime. **TT pg 128.**

Ground One: Ineffective Assistance of Counsel

In *State v. Thomas* the Supreme Court of Appeals of West Virginia articulated the following test to determine whether or not an accused was prejudiced by ineffective assistance of counsel:

> Courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that

> proved counsel error which does not affect the outcome of the case will be regarded as harmless error. 157 W.Va. 640, 665, 203 S.E.2d 445, 461 (1974).

In *State v. Miller* the Supreme Court of Appeals of West Virginia articulated the following:

> In reviewing counsel's performance, court's must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.
>
> Syl. Pt. 6, 459 S.E.2d 114 (1995).

The United States Supreme Court has also addressed the standard to be used in assessing ineffective assistance of counsel claims. In *Strickland v. Washington*, 466 U. S. 668, the High Court established a two prong standard to determine ineffectiveness. Initially, the Petitioner must show the performance of trial counsel was deficient in specific instances and not rising to the standard of the reasonably competent criminal attorney. Secondly, the Petitioner must exhibit that trial counsel's deficient performance caused prejudice to the Petitioner, such that the outcome would otherwise have been different.

Trial counsel, Gregory Courtright failed to exhibit the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law. Accordingly, the Petitioner was prejudiced by ineffective assistance of counsel as illustrated below.

1. Ineffective investigation and compilation of Defendant's psychiatric records

According to the Psychiatric Forensic Evaluation (*Exhibit A*) Mr. Breeding reported a long history of psychiatric illness. In fact the Petitioner was treated on an inpatient basis at a psychiatric hospital located in Chicago, Illinois and known as "Ravenswood." However, these records were not presented to Dr. Thistlethwaite for his review prior to his examination of the Petitioner. We know this because under the heading of "records reviewed" in the Psychiatric Forensic Evaluation (*Exhibit A*) these records are not listed. In fact, in his letter to the trial court, Dr. Thistlethwaite was under the erroneous assumption that the records were to come from the court. (*See, Letter from Doctor to Court, attached as Exhibit B*). Hence the question becomes whose responsibility was it to obtain these records and provide them to Dr. Thistlethwaite for his review.

The answer to that question is the responsibility was upon Mr. Courtright. No other person, not the judge, nor the prosecutor were privy to those records. In fact, in a letter dated July 15, 1996, Judge Spaulding brought this matter to Mr. Courtright's attention. (*See Attached as Exhibit C*). Nevertheless, those records were apparently not secured and provided to the evaluating physician. At a minimum, these records do not appear in the court file

in this case. Hence, the assumption must be that these records were never obtained by counsel during his investigation.

The Petitioner was prejudiced by this ineffectiveness at pre-trial, at trial and during sentencing. During pre-trial, the Petitioner was prejudiced by counsel's lack of investigation. If counsel had obtained the Petitioner's prior medical and psychiatric records, perhaps the Petitioner would have chosen and been presented with a more viable defense than simply weakness in the identification. Possibly the medical records would have indicated a strong diminished capacity argument. Medical records reflecting the treatment for mental diseases are material to determination of the question of defendant's competency to stand trial. *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976). Thus, the Petitioner was prejudiced by counsel's lack of investigation at the pretrial level.

The Petitioner was prejudiced during his trial by counsel's lack of investigation. The Petitioner met only once with the private investigator employed by trial counsel. The Petitioner asserts that trial counsel failed to inform him of any results of said investigation, and that said lack of information forced the Petitioner to make uninformed tactical trial decisions. The Petitioner asserts that trial counsel was unprepared for trial. Petitioner asserts that trial counsel exhibited his unpreparedness for trial by his nervousness, fear, inattentiveness, cracking voice, and fumbling around with papers. Upon Petitioner observing trial counsel's evidence of unpreparedness, Petitioner's confidence was shaken in counsel, and this

forced the Petitioner to accept poor advise from trial counsel.

The Petitioner was prejudiced at sentencing by counsel's lack of investigation. If counsel had obtained the Petitioner's prior psychiatric records, the trial court may have had before it a plethora of evidence indicating Petitioner's numerous psychiatric problems. Dr. Thistlethwaite, in his brief evaluation listed the possibility of psychotic depression including paranoia, auditory hallucinations, and thoughts of suicide. With the addition of the prior records, Dr. Thistlethwaite's evaluation may have been affected. The addition of the prior records may have had a mitigating effect upon the sentence. A defendant suffering from mental illness is often not sentenced the same as a defendant without a mental illness. In our civilized society an attempt is made to treat those with a mental illness that may have affected their culpability in a crime differently than those without an illness. Hence, the Petitioner was prejudiced during sentencing, in that he was not given an opportunity to present possibly mitigating evidence to the court.

Considering the extent and magnitude of errors committed by trial counsel, there is a reasonable probability that, had these professional errors not been committed, the Petitioner may not have been convicted. Accordingly, trial counsel error did affect the outcome of the case and cannot be regarded as harmless error, and the Petitioner was prejudiced by ineffective assistance of trial counsel. Such ineffective assistance of counsel is violative of the Petitioner's right to a fair trial under the West Virginia Constitution, Art. III, § 10, and a deprivation of his right to due process under the United

States Constitution. In the case at bar, the Petitioner's allegations regarding the representation he received indicate ineffective assistance. Thus, Petitioner has shown that trial counsel's representation fell below an objective standard of reasonableness and such failure resulted in prejudice so as to render the results of the trial unreliable.

2. Ineffective assistance through failure to obtain a competency hearing and secure an expert witness

The Petitioner further asserts that trial counsel, Gregory M. Courtright, Esq. ineffectiveness as counsel was further demonstrated when said counsel failed to schedule a hearing to determine if further psychiatric evaluation was merited to build a defense. *W.Va. Code § 27-6A-2 Hearing on competency to stand trial;* findings provides in pertinent part as follows:

> The defendant shall have the right to an examination by an independent expert of his or her choice and testimony from such expert as a medical witness on his or her behalf.

Hence, trial counsel's failure to request a competency hearing and secure an expert witness prejudiced the Petitioner and further exhibits trial counsel's ineffectiveness. Unless a competency hearing is requested by a criminal defendant who has been previously examined pursuant to *W.Va. Code § 27-6A-1*, this important hearing is waived. *See, State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987). Thus, trial counsel's failure to explore this avenue of assistance and investigate defendant's competence further amounts to ineffective assistance of counsel. *But see, State v. Garrett,*

182 W.Va. 166, 386 S.E.2d 823 (1989) in which the Supreme Court of Appeals held that since there is no due process right to a competency hearing where psychological evidence performed prior to trial revealed that the appellant was aware of his legal rights and able to participate in his defense, the lawyer was not ineffective for failing to raise these issues. Nevertheless, even if trial counsel's failure to request a competency hearing is not a *per se* ineffective assistance of counsel claim, it is more evidence that the cumulative errors by trial counsel had a significant impact on the outcome and sentence at trial.

Ground Two: Incapacity to Stand Trial Due to Drug Use

Petitioner, Grover Lee Breeding, was unable, due to mental illness and behavior modifying drugs prescribed and administered by the jail, to assist with his defense. The Petitioner, during the trial, was medicated with Mellaril (15 mgs), Desyrel (50 mgs), and Prozac (20 mgs) daily. *See, Exhibit A.*

Mellaril, or thioridazine hydrochloride, is an antipsychotic drug administered in both capsule/tablet form or syrup. The drug's mechanism of action is to block postsynaptic dopamine receptors in the brain. Common adverse reactions to the drug include tardive dyskinesia (tardy voluntary movements), high incidents of sedation, and blurred vision. *See, Nursing Drug Handbook*, pg. 428 (1994).

Desyrel, or trazodone hydrochloride, is an antidepressant drug administered in tablet form. The

drug's mechanism of action is to inhibit serotonin uptake in the brain; is considered an atypical antidepressant. Common adverse reactions to the drug include drowsiness, dizziness, nervousness, fatigue, confusion, tremors, and weakness. *Id.* at 395-396.

Prozac, or fluoxetine hydrochloride, is an antidepressant. The drug's mechanism of action is to inhibit the central nervous systems uptake of serotonin; is considered an atypical antidepressant. Common adverse reactions to the drug include nervousness, anxiety, insomnia, headache, drowsiness, and dizziness. *Id.* at 383.

Thus, Petitioner, Grover Lee Breeding, was unable, due to mental illness and behavior modifying drugs prescribed and administered by the jail, to assist with his defense. Thus, the Petitioner was incompetent to stand trial. The United States Supreme Court has held that "the conviction of an accused person while he is legally incompetent violates due process." *Bishop v. United States*, 350 U.S. 961, 100 L.Ed. 835, 76 S.Ct. 440 (1956).

Ground Three: Mental Competency at Time of the Crime

On the date of the crime, the Petitioner, Grover Lee Breeding, was using multiple medications and illicit substances. He explained Dr. Thistlethwaite that he had taken fioricet, soma, and consumed beer, whiskey, and marijuana. As a result, he awakened from a black out and discovered one hundred and forty dollars ($140) in his possession. *See, Exhibit A.*

Considering the Petitioner's inebriated condition, it is respectfully submitted that the Petitioner was clearly not competent during the commission of the crime. The offense of aggravated robbery is not a strict liability crime, but requires a *mens rea criminis*. Additionally, a mental state of *animus furandi* is likewise required for a the crime. of robbery to occur. *State v. Plumley*, 179 W.Va. 356, 368 S.E.2d 726 (1988). The Petitioner could not form this intent when he was so inebriated. He should not be accountable for the acts he committed while he was incompetent.

Therefore, the Petitioner was denied due process of law, in that he was tried and convicted for a crime he committed while he lacked mental responsibility for said crime. *State v. Bias*, 177 W.Va. 302, 352 S.E.2d 52 (1986), *State v. Milani*, 159 W.Va. 691, 226 S.E.2d 433, *State v. Swiger*, 175 W.Va. 578, 336 S.E.2d 541 (1985).

The Petitioner does recognize, and in candor to the tribunal does acknowledge, that the Supreme Court of Appeals has generally refused voluntary intoxication as a defense. *See, State v. Robinson*, 20 S.E. 713; *State v. Lambert*, 173 W.Va. 60, 312 S.E.2d 31.(1984); and *State v. Phalen*, 192 W.Va. 267, 452 S.E.2d 70 (1994), among others.

Ground Four: Information in Pre-Sentence Report Erroneous or Obtained Illegally

W.Va. R. Crim. P. 32(b)(2) Presence of counsel provides that upon good cause shown, the court may afford the defendant's counsel the right to notice and a reasonable opportunity to attend any interview of the

defendant by a probation officer during the course of the presentence investigation.

As stated in the fact section, the Petitioner was interviewed by the trial court's probation officer without the presence of counsel. The Petitioner asserts that this interview was a violation of his right to representation by counsel at all stages of the proceeding. Although counsel cannot find West Virginia case law where this issue has been addressed, certain federal cases are persuasive authority.

In fact, in *U.S. v. Herrera-Figueroa*, 918 F.2d 1430 (1991) the court held that due process is violated when a probation officer refused defendant's request to be accompanied by counsel at the presentence interview. *See also*, Franklin D. Cleckley, 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* II-312 (2d ed 1993).

Thus, the Petitioner's due process rights were violated when the trial court's probation officer interviewed the Petitioner without counsel's consent or notice. The trial judge permitted the Defendant's counsel to redact portions of the sentencing report to which counsel believed was illegally obtained. However, as the trial judge ably stated, "the cat's out of the bag. Where do we go from here. I mean, I've read it." And once the bell is rung, it is impossible to unring it. The trial judge read the illegally obtained statement from the Defendant. Therefore, the Petitioner's petition for writ of habeas corpus should be granted by this court.

Ground Five: Excessive Sentence

The West Virginia Constitution, Art. III, §5 provides in pertinent part that "[p]enalties shall be proportioned to the character and degree of the offense." The Constitution of the United States, Amendment VIII provides that "[e]xcessive bail shall not be required, . . ., nor cruel and unusual punishments inflicted." The Petitioner, Grover Lee Breeding, asserts that the sentencing trial court violated the West Virginia Constitution, Art. III, §5 and the VIII Amendment of the United States Constitution when it sentenced him to seventy-five (75) years for robbery.

The United States Supreme Court has found that the protection of the VIIIth amendment proscription of cruel and unusual punishment includes sentences that are disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983), *See Also*, 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* II-393 (2d ed 1993). In *Solem*, the High Court held that an VIIIth amendment proportionality analysis should be guided by objective factors that include: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.

However, before using the complicated test provided above, the Supreme Court of Appeals of West Virginia, in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1953), provided that rather than an analysis of disparity principles as provided for by the *Solem* Court, a

reviewing court may use another test. The test provided for in *Cooper* is a subjective test in which the reviewing court determines whether the sentence for "the particular crime shocks the conscience of the court and society." *See, Id.* at *Syl. Pt. 5.* If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.

1. Grover Breeding's Sentence of Seventy-Five Years Shocks the Conscience

In his evaluation to the trial court, under. the heading marked "Recommendation/Discussion" (*Exhibit A*) Dr. Daniel B. Thistlethwaite wrote that "[w]ith regard to criminal responsibility, again although Mr. Breeding has a **severe and chronic mental illness**, it does not appear that this mental illness impaired his ability to conform his behavior[.]" (Emphasis added). Thus, although the Petitioner, Grover Lee Breeding, was held criminally responsible for his actions, Dr. Thistlethwaite recognized and diagnosed that the Petitioner suffered from dual Axis I disorders, including bipolar disorder and depression with severe psychotic features, as well as polysubstance dependence on alcohol, marijuana, and methamphetamines. *See, Exhibit A.*

Also, please recall that the Dr. Thistlethwaite's diagnosis' was made without the Petitioner's mental health records from "Ravenswood." Perhaps those records would have shown other mental illnesses from which the Petitioner suffers. Based upon the Petitioner's mental illnesses that were revealed to the sentencing trial court during pre-trial, trial, and sentencing, a seventy-five (75) year sentence shocks the conscience.

Although the Petitioner's sentence, based solely on his mental illnesses is sufficient to shock the conscience, the facts surrounding the Petitioner's crime serve to emphasize the lack of proportionality in the seventy-five year sentence. The State of West Virginia alleged that Grover Lee Breeding presented a firearm to a clerk and demanded money. Upon receiving said money, the Petitioner fled from the store. Other than receiving a nasty scare, the clerk was not injured. In fact, during the pre-sentence investigation Probation Officer Sheila Whittington illegally interviewed the Petitioner without counsel being present. During that illegal interview the Petitioner informed Officer Whittington that "[w]ell, I really don't know that I would shoot somebody. Probably would just hit them in the head if they refused to give me the money." (*See, excerpt from Sentencing Hearing, pg 128, Attached as Exhibit D*).

Although the Petitioner recognizes that the Supreme Court of Appeals of West Virginia has written that "aggravated robbery in West Virginia has been recognized as a crime that involves a high potentiality for violence and injury to the victim involved," *State v. Woods*, 194 W.Va. 250, 460 S.E.2d 65 (1995) (per curiam) (Emphasis added), little actual violence transpired during the crime. This court, while considering the facts surrounding the offense, should place significant weight on the fact that the Petitioner did not physically harm or exert physical force upon the clerk.

Thus, the Petitioner asserts that a seventy-five year sentence for aggravated robbery shocks the conscience when one considers the Petitioner's chronic mental illness

and the lack of actual violence in the commission of the crime. Therefore, this court should vacate the sentence.

2. Grover Breeding's Sentence of Seventy-Five Years, Even If Not Shocking to Conscience, is Disproportionate Based Upon Objective Factors

A disproportionality challenge is guided by the objective test found in *Syl. Pt. 5, Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), when it cannot be said the sentence shocks the conscience. "In determining whether a given sentence violates the proportionality principle found in Article III, §5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *Id.* at 523. Grover Breeding's seventy-five (75) year sentence is disproportionate based upon these factors.

a. The Nature of the Offense

As conceded above, aggravated robbery in West Virginia has been recognized as a crime that involves a high **potentiality** for violence and injury to the victim involved, *State v. Woods, Supra,* (Emphasis added). However, little actual violence occurred during this transaction. The clerk was presented with a firearm and ordered to hand over money. Then the Petitioner fled from the store. However, the Petitioner would be remiss without conceding that he was previously convicted for aggravated robbery on two (2) prior occasions.

Nevertheless, even conceding the prior convictions, based upon the facts this occurrence was a "garden variety" aggravated robbery. Hence. although the nature of the offense has the potential for violence, little violence actually occurred. Thus, the nature of the offense is not sufficient to justify a seventy-five year sentence.

b. The Legislative Purpose Behind the Punishment

Obviously, the purpose behind the aggravated robbery statute is to deter and punish those who would rob another. The legislature has vested broad discretion in the trial judge to impose a determinate sentence in the penitentiary of ten (10) years to life. *See, Carter v. Bordenkircher*, 159 W.Va. 717, 226 S.E.2d 711 (1976). However, that discretion is not unfettered. A trial judge's discretion, while very broad in sentencing for robbery, must be tempered by West Virginia Constitution, Art. III, §5, requiring sentences to be proportional to the character and degree of the offense. *State v. Cooper, Supra.*

Thus, the sentencing court must consider mitigating and aggravating circumstances when reaching its decision. To support imposition of a robbery sentence, the sentencing record should include the presentence report and any other diagnostic reports used as an aid in imposing the sentence. Finally, the sentencing judge shall state on the record his reasons for selecting the particular sentence. *Id.* The Petitioner, Grover Lee Breeding, does not assert that the sentencing court did not state on the record the reasons for the particular sentence selected. Instead, the Petitioner asserts that the reasons stated by the sentencing court are insufficient to justify a seventy-five year sentence for the reasons previously

argued. Namely, that due to the Petitioner's mental illnesses and lack of violence causing injury to the clerk, the sentence in this case is excessive.

c. A Comparison of the Punishment with What Would be Inflicted in Other Jurisdictions

The third factor to be considered in a claim that a sentence is objectively disproportionate to the crime is a comparison of other jurisdiction's sentences for the same crime. In *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984), the Supreme Court of Appeals of West Virginia conducted such a study. In footnote 3, the Court wrote that it reviewed the statutory scheme of other jurisdictions and found that the defendant's seventy-five (75) year sentence in *Buck* was substantially longer than the maximum permissible sentence for aggravated robbery in a majority of jurisdictions. *Id.* at 245-246. In fact, the court concluded that in twenty-nine states the maximum sentence would be less than seventy-five years. *See, footnote 3.* However, in being candid to the tribunal, the Petitioner must point out that the defendant in Buck and subsequent analysis by the Supreme Court of Appeals of West Virginia involved penalties for first offense aggravated robbery.

d. Comparison of Other Offenses Within West Virginia

The final factor to be considered in a claim that a sentence is objectively disproportionate to the crime is a comparison of other offenses within West Virginia. The West Virginia Legislature, through *W.Va. Code § 62-12-13* has provided that a person convicted of aggravated

robbery, with the use, presentment, or brandishing of firearm, shall not be eligible for parole prior to serving a minimum of five years his sentence or one third of his definite term sentence whichever shall be the greater.

Because a person under a life sentence can become eligible for parole in ten years, *W.Va. Code § 62-12-13*, it is possible under the robbery open ended sentencing statute for a defendant to actually serve a longer sentence in terms of years than might be served under a sentence of life. Hence, it cannot be doubted that the imposition of a seventy-five year sentence for robbery imposes a penalty which in our state is unmatched except for the crime of first degree murder, treason and kidnaping involving bodily injury, and even then only when the jury refuses to recommend mercy. Thus, we are confronted with this anomaly whereby a conviction for aggravated robbery is elevated above the punishment a murderer who is found by the jury to warrant a recommendation of mercy would receive. *See, Wanstreet, Supra.*

Thus, the Petitioner, Grover Lee Breeding, will likely be incarcerated longer for aggravated robbery than a criminal defendant convicted of first degree murder with a determination of mercy. Hence, the Petitioner, who injured no one during the commission of his crime, now asserts that the seventy-five year sentence in the case at bar is disproportionate based upon objective factors contained within West Virginia common law. Therefore this court should vacate said sentence.

Wherefore, based upon the foregoing arguments, Petitioner hereby requests this Court to grant his petition

for a writ of habeas corpus, that this Court schedule an omnibus evidentiary hearing, and finally, that this Court grant the Petitioner a new trial, or vacate his seventy-five (75) year sentence, and any further relief this Court deems necessary, just, and proper.

Grover Lee Breeding
By Counsel

s/_____

D. Scott Bellomy, Esq. (#8028)
Bellomy & Turner
418 8th Street, Suite 105
Huntington, West Virginia 25701

IN THE CIRCUIT COURT OF PUTNAM COUNTY
WEST VIRGINIA

GROVER L. BREEDING,
Petitioner,

V. CASE NO. 99-C-123
(O. C. Spaulding, Judge)

HOWARD PAINTER, Warden,
Respondent.

ORDER

On the 1st day of April, 2002, came the petitioner, in person, and by his Counsel, D. Scott Bellomy, and came the respondent through his attorney, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, for an omnibus hearing regarding the petitioner's Writ Of Habeas Corpus.

The petitioner called his first witness Natalie Elliott, a pharmacist, who provided testimony to the Court. After cross-examination of said witness, the petitioner's Counsel called Grover L. Breeding who testified, and after cross-examination, the petitioner rested. Counsel for the respondent then called attorney Gregory M. Courtright, who testified on behalf of the respondent and was then subject to cross-examination by the petitioner. The respondent then informed the Court that it had one additional witness to call, being Dr. Daniel Thistlethwaite, who was not available due to his being

subject to surgery, and the respondent move the Court to continue the hearing until April 10, 2002, at 9:30 a.m., which motion the Court ORDERED granted.

Due to the fact that this matter is continued until April 10, 2002, at 9:30 a.m., the Court doth hereby ORDER the West Virginia Department of Corrections to transport the petitioner, Grover L. Breeding, to the Putnam County Judicial Building, Courtroom A, on said date and time, and upon the conclusion of said hearing the West Virginia Department of Corrections shall transport the petitioner back to Mount Olive Correctional facility.

ENTERED this the 3rd day of April, 2002.

s/_____
O. C. Spaulding, Judge

Presented by:

s/_____
Mark A. Sorsaia
Prosecuting Attorney
Putnam Co. Judicial Bldg.
3389 Winfield Road
Winfield, WV 25213
Bar No. 3516

[s/Notation]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th of March, 2007, the following order was made and entered:

State of West Virginia ex rel. Grover L. Breeding, Petitioner

vs.) No. 063188

Thomas McBride, Warden, Mt. Olive Correctional Complex, Respondent

On a former day, to-wit, November 22, 2006, came the petitioner, Grover L. Breeding, by David L. Hill, his attorney, and presented to the Court his petition praying for a writ of habeas corpus ad subjiciendum to be directed to the respondent, Thomas McBride, Warden, Mt. Olive Correctional Complex, commanding him to appear before this Court and show cause, if any he can, why he detains and restrains said petitioner of and from his liberty.

Upon consideration whereof, the Court is of opinion that a. rule should not be awarded, and the writ prayed for by the petitioner is hereby refused. Justices Starcher and Albright would grant.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

GROVER L. BREEDING,

Petitioner,

v. Case No. 99-C-123
(O. C. Spaulding, Judge)

HOWARD PAINTER, Warden,

Respondent.

FINAL ORDER
DENYING HABEAS CORPUS RELIEF

On the 1st day of April, 2002, came the petitioner, Grover L. Breeding, in person, and by his Counsel, D. Scott Bellomy, and came the respondent, Howard Painter, Warden,. through his attorney, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, for an omnibus hearing regarding the petitioner's Writ Of Habeas Corpus.

The petitioner called his first witness, Natalie Elliott, a pharmacist, who provided testimony to the Court. After cross-examination of said witness, the petitioner's Counsel called Grover L. Breeding who testified, and after cross-examination, the petitioner rested. Counsel for the respondent then called the defendant's trial attorney Gregory M. Courtright who testified on behalf of the respondent and was subject to cross-examination by the

petitioner. The petitioner waived, on the record, any attorney-client privilege he could claim regarding said testimony. The respondent then informed the Court that he had an additional witness, being Dr. Daniel Thistlethwaite, who was not available due to his illness and need for surgery. The matter was then continued until April 10, 2002, at 9:30 a.m.

On that date appeared the petitioner in person and by his Counsel, D. Scott Bellomy, and came the respondent by and through his attorney, Mark A. Sorsaia, Prosecuting Attorney of Putnam County, West Virginia, for a continuation of the omnibus hearing regarding the petitioner's Writ For Habeas Corpus. At that time the respondent called Dr. Daniel Thistlethwaite, Psychiatrist, to testify and after being subject to cross-examination, the respondent rested.

After reviewing the pleadings in this matter, which include, but are not limited to, the Petition, and the response, and after listening to the testimony of witnesses given in this case on behalf of the petitioner and the respondent and the cross-examination of those witnesses, the Court doth hereby make the following findings of fact and conclusions of law:

STATE AND FEDERAL RIGHTS RAISED BY THE PETITIONER

The Court makes the specific finding that the following are the constitutional rights that were raised by the petitioner in his Petition.

1. Ineffective assistance of Counsel.
2. Incapacity to stand trial due to drug use.

3. Mental competency at the time of the crime.[1]

4. Erroneous presentence report.

5. Allegation of an excessive sentence violating the petitioner's constitutional rights.

GROUNDS ASSERTED OR WAIVED
IN A POST-CONVICTION
HABEAS CORPUS PROCEEDING

The petitioner acknowledged in open Court that he had discussed with his counsel all possible grounds that may apply to his case and that he had indicated all alleged grounds of relief by his amended petitions and the grounds asserted in the attached Losh checklist. The Court advised the petitioner that all grounds not raised in this hearing would be deemed forever waived by the Court.

The Court does therefore find that the petitioner has, with the advice of Counsel, made a knowing, intelligent and voluntary waiver of all other grounds of relief, both State and Federal, that could have been asserted in this petition, but were not, and does therefore find that any and all other grounds of relief not asserted are hereby forever waived.

The petitioner further waived any privilege he may have with respect to his former attorney/client relationship with Mr. Courtright.

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[1]This issue was withdrawn by the petitioner during the course of the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CONSTITUTIONAL ISSUES RAISED BY GROVER L. BREEDING

INEFFECTIVE ASSISTANCE OF COUNSEL

The parties agreed in their Memorandums of Law that in the case of State v. Thomas our Supreme Court stated that courts should measure and compare the question of Counsel's performance by whether he or she exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proof of error which does not affect the outcome of the case will be regarded as harmless error. 157 W.Va. 640, 665, 203, S.E.2d 445, 461 (1974). In State v. Miller our Supreme Court stated that in reviewing Counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstance's, the identified acts or admissions were outside the broad range of professional competent assistance while at the same time refraining from engaging in hind sight or second guessing of trial Counsel's strategic decisions. Thus, the reviewing court must ask whether a reasonable lawyer would have acted, under the same circumstances, as defense Counsel acted in the case at issue. Syl. Pt. 6, 459 S.E.2d, 114 (1995).

After considering the allegations in the Petition, the response filed by the respondent, and the testimony provided the Court, this Court is of the opinion as a matter of law that Gregory M. Courtright did not fail to exhibit the normal and customary degree of skill possessed by attorneys who are reasonably

knowledgeable of criminal law in this case, and the petitioner was not prejudiced by ineffective assistance of Counsel as alleged.

In support of said opinion, the Court finds the following facts produced by the record. The petitioner's argument that his Counsel's failure to collect some of the petitioner's medical and psychological records amounts to ineffective assistance of Counsel has no merit. The Court finds from the record that Dr. David Clayman and Dr. Daniel Thistlethwaite performed all pretrial forensic evaluations of the petitioner and had all of the information necessary to make an evaluation as to whether or not the petitioner was criminally responsible or competent to stand trial regardless of whether defense Counsel failed to collect and forward to the evaluators some of the defendant's historical records. Dr. Thistlethwaite testified that the petitioner had the psychological capabilities and the mental capabilities to give him a detailed history of his past medical treatment or psychological illnesses. Reviewing the reports provided to this Court by Dr. Thistlethwaite and Dr. Clayman, one will find a detailed reference to the petitioner's history. Also, the Court finds that some records not received by Dr. Thistlethwaite were collected and provided to Dr. Clayman.

The Court also finds from the testimony of Dr. Thistlethwaite that those records not provided to him were not of a nature that would have changed the findings regarding criminal responsibility and competency to stand trial. Dr. Thistlethwaite was of the opinion at the time of the evaluation and at the time of his recent testimony that he had sufficient information to

make a finding regarding criminal responsibility and competency to stand trial, despite the lack of certain prior records being provided to him. Dr. Thistlethwaite stated that the defendant adequately described to him his prior diagnosis and treatment and that information was consistent with his diagnosis. The Court also finds that the petitioner, who has the burden of proof, has not provided any evidence whatsoever that the existence of those prior records or having those records provided to Dr. Clayman and Dr. Thistlethwaite would have in any way changed their evaluations, and therefore has, failed to meet the burden of proof in regard to that argument.

The Court also finds that the petitioner has failed to establish any evidence to indicate that his trial Counsel did not properly investigate the case prior to trial or that trial Counsel was unprepared for trial, which again justifies this Court's finding that the petitioner has failed to establish ineffective assistance of Counsel.

Further, the Court finds that the petitioner has failed to provide any evidence to support his argument that trial Counsel was ineffective or the petitioner is entitled to any relief due to trial Counsel's failure to obtain a competency hearing and secure an expert witness. The Court finds that the trial Counsel had no information whatsoever that would have indicated to trial Counsel that the opinions of Dr. Thistlethwaite and Dr. Clayman were subject to challenge. Mr. Courtright, the petitioner's trial counsel, had the opportunity to meet with, and work with, the petitioner, Grover L. Breeding, and had an opportunity to assess from a layman's perspective Mr. Breeding's ability to understand the nature of the proceedings against him, and to understand the

petitioner's ability to work with him in order to prepare a defense. After trial Counsel had an opportunity to review the reports of Dr. Thistlethwaite and Dr. Clayman, there was no information provided in said reports that would have or should have indicated to trial Counsel that a hearing on competency was necessary or would possibly provide the defendant with an insanity defense.

Therefore this Court finds Counsel's performance met the standard of an attorney who was reasonably knowledgeable of criminal law, and does not indicate that the petitioner was prejudiced by ineffective assistance of Counsel in regard to this issue.

INCAPACITY TO STAND TRIAL
DUE TO DRUG USE

This Court makes a finding of law that the petitioner, Grover L. Breeding, has failed to provide evidence to this Court sufficient to establish that he was not competent to stand trial due to medications prescribed for him and administered by the Regional Jail.

The petitioner alleges that due to medications provided at the Regional Jail that he was "foggy minded" and not able to assist his lawyer in his defense during his trial. The Court finds that there is no credible evidence to support this contention, and therefore the petitioner should not be provided any relief regarding this issue.

The Court makes the following findings of fact. The petitioner alleges that he was on 100 mgs. of the drug Mellaril, 50 mgs. of the drug Desyrel and 2 mgs. of the

drug Prozac. The petitioner alleges that he was foggy minded and was not able to assist his attorney at trial due to the affects of these mind altering drugs.

The petitioner called a licensed pharmacist, Natalie Elliott, who testified under oath of the potential side affects of these drugs which included the possibility of being drowsy. The witness also testified that these drugs often times help patients in the everyday functioning of life. The Court finds that this witness, even though obviously a competent professional, failed to provide the Court with any direct evidence that the petitioner did in fact suffer from side effects of these drugs, at the time of his trial, but only provided evidence that these drugs may have common potential side effects. The witness never examined the petitioner and could not state the effects, if any, the prescribed medication had on the petitioner. Further, even if the defendant had suffered common side effects of these drugs, there is no evidence that such side effects. would have prevented the defendant from effectively assisting his counsel.

The only evidence in support of the petitioner's claim on this issue was that of the petitioner who under oath testified that he was foggy minded and that he was often sleepy, but he admitted that he had been on these drugs for almost one year prior to trial. The petitioner alleges that it affected his defense in that it caused him to make bad decisions. The Court finds the petitioner's testimony not to be credible in light of the fact that he was unable to tell the Court what medications he was currently on and how much he was taking at the current time when he could remember in detail-the-affects that certain drugs had on him some five years ago. The Court finds that the

petitioner did not complain to any individual at the time of his evaluations or at the time of trial that he was feeling sleepy or foggy minded, and did not raise this issue until the filing of this habeas proceeding. The Court relies on the testimony of his trial Counsel in which his trial Counsel testified under oath that the petitioner was mentally alert and had the ability to work with him during the course of the trial, and the defendant's Counsel had no indication whatsoever that Mr. Breeding was in any way mentally impaired at the time of the trial.

The Court also finds that Dr. Thistlethwaite, who evaluated Mr. Breeding while he was under the influence of these same prescribed drugs, had no indication that Mr. Breeding was suffering from any side affects. Dr. Thistlethwaite found the defendant competent to stand trial despite the fact that he was taking said prescriptions. Dr. Thistlethwaite's opinion was that the drugs and dosages the petitioner were on at the time would not affect his ability to appropriately interact with the judicial process or in any way have impaired his ability to communicate effectively with Counsel. Dr. Thistlethwaite had the opinion that even if sedated this would not impair his ability to have a rational thought of reasoning, but simply to have difficulty with arousal levels. Dr. Thistlethwaite also indicated that the prescribed dosages of these medications were appropriate and, in some instances, even low dosages. Again, it is noted that all of these medications were being taken by the petitioner at the time Dr. Clayman evaluated him and there was no indication of the defendant being "foggy minded" or otherwise incapable of assisting his counsel when Dr. Clayman evaluated him.

MENTAL COMPETENCY AT THE TIME OF THE CRIME

The Court finds that the petitioner raised in his petition the issue that he was not mentally competent at the time of the crime. In his petition he claims that he was denied due process of law in that he was tried and convicted for a crime he committed while he lacked the mental responsibility of said crime. Apparently from the record the petitioner has withdrawn from that position. The Court makes a finding of fact that the petitioner in the omnibus hearing provided no evidence whatsoever to support the contention that he was not criminally responsible at the time of the crime. In fact, the only witnesses called on behalf of the petitioner were the petitioner himself and a pharmacist who testified in the abstract about the potential side affects of prescribed drugs, but that she had never met the petitioner. The Court finds that the petitioner himself conceded that he could not provide any evidence whatsoever that Dr. Clayman and Dr. Thistlethwaite were incorrect in their assessment that he was criminally responsible for his alleged acts. From Page 32 of the transcript, when asked whether or not thought Dr. Clayman or Dr. Thistlewaite were wrong regarding the issue of criminal responsibility, the petitioner said the following, "I'm an inmate, I'm not a psychologist or a psychiatrist."

Question: "So you don't know that they were wrong."

Answer: "I'm just saying I don't know."

Counsel for the petitioner also indicated that the petitioner was withdrawing his claim.

The Court makes a finding that there has been no evidence provided by the petitioner suggesting that the petitioner was not criminally responsible.

INFORMATION AND PRE-SENTENCE REPORT ERRONEOUS OR OBTAINED ILLEGALLY

The petitioner cites West Virginia Rule Of Criminal Procedure 32 (b) (2). There is evidence in this record to suggest that the defendant was interviewed by a probation officer out of the presence of defense Counsel, and some of the statements made by the petitioner were included in the presentence report. The Court makes the following finding. During the sentencing hearing, Philip W. Morrison, II, an Assistant Prosecuting Attorney, stated the following, "As far as what you do, you're right, there is no difference in the defendant's version from the evidence you saw at trial, with the exception of the mitigating statement, which is "well I really don't know that I would shoot somebody". The Court then stated in the sentencing hearing, "So your request is that the Court strike from the report and from and record any statements made by your client under the category i.e. defendant's version beginning at the top of page four?" Mr. Morrison on behalf of the State agreed with no objection and the defense Counsel said yes.

The Court makes a finding that this matter was resolved by having the Court strike the information from the presentence report. By striking the information from the presentence report, the trial Court took the position that the information would not be relied upon at sentencing. The Court further finds that the statement was not in fact prejudicial in light of the other facts and

circumstances of the case and did not affect the sentence imposed on the petitioner. The information provided by the defendant was consistent with the evidence the Court heard at trial. If there was error, it was harmless error.

ALLEGATION OF EXCESSIVE SENTENCE

The Court finds that the petitioner did not receive an excessive sentence under the West Virginia Constitution or the United States Constitution. The Court relies on the case of State of W.Va. v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), in which the Court lists the two steps to determine whether or not a sentence is so disproportionate to a crime that it violates the Constitution. The first step is a subjective test that asks whether the sentence shocks the conscience of a court and society, and if the sentence is so offensive that it can not pass a societal sense of justice, then the second test which is an objective one, is imposed consistent with the case of Waynestreet v. Bordenkircher, 166 W.Va. 523, 276 S.E. 2d 205 (1981). The Court finds that the sentence of seventy-five years imposed on the petitioner does not violate the Constitution under the subjective analysis and the objective analysis.

The Court finds that the pre-sentence report indicates that the petitioner has an extensive criminal history. The most glaring example of his history is the fact that he has two convictions for aggravated robbery, both committed with the use of a firearm. He was first convicted of an aggravated robbery in 1992 with the use of a firearm and was sentenced to a period of twenty-seven years. The petitioner was then paroled in 1994, but was subject to a parole violation in 1995. He again committed aggravated

robbery with the use of a firearm in 1996. This Court finds that the use of a firearm in the commission of this aggravated robbery in 1996 was the second time that the petitioner selected to take a gun and commit a robbery. After the petitioner was sentenced to the twenty-seven years in the penitentiary on his first aggravated robbery and then paroled, he then elected to commit another act of violence. Given the defendant's repeated pattern of committing aggravated robberies with a firearm, the public is at risk. Therefore, the Court finds that a sentence of seventy-five years does not violate the Constitution.

Wherefore, the Court finds that the petitioner is entitled to no relief, and it is therefore **ORDERED** that the writ heretofore issued is discharged and held for naught, and that the petition herein be dismissed with prejudice from the docket of this Court.

It is **FURTHER ORDERED** that the Clerk of this Court shall provide a copy of this order to (1) D. Scott Bellomy, Attorney at Law, 418 Eighth Street, Suite 201, Huntington, West Virginia 25701; (2) Mark. A. Sorsaia, Prosecuting Attorney, Putnam County Judicial Building, 3389 Winfield Road, Winfield, West Virginia 25213; (3) Grover L. Breeding, Mount Olive Correctional Facility, Mt. Olive, West Virginia; and (4) West Virginia Supreme Court of Appeals, Building 1, Room E-400, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305-0830, for filing in the Supreme Court's habeas corpus archives.

Entered this 7th day of June, 2002.

s/_____
O.C. SPAULDING, Judge

ENTERED
PUTNAM COUNTY CIRCUIT CLERK
DONALD A. WRIGHT
JUN 10 2002
CIVIL ORDER BOOK
NO 131 PAGE 431-440
6-10-2002
CC-WV Supreme Ct. Appeals
Breeding, Bellomy

No. 24

THE CIRCUIT COURT OF
PUTNAM COUNTY

July Term, 1996

STATE OF WEST VIRGINIA

v.

GROVER L. BREEDING

indictment for felony

A True Bill.

s/
Foreman of the grand jury.

Attest.

s/
William H. Rardin, III
Prosecuting Attorney of
Putnam County, West Virginia

In the Circuit Court of Putnam County, West Virginia

STATE OF WEST VIRGINIA, COUNTY OF PUTNAM, TO-WIT:

The grand jurors of the State of West Virginia, in and for the body of the County of Putnam, upon their oaths present:

that GROVER L. BREEDING on the ___ day of November, 1995, in the said County of Putnam, committed the felony offense of "AGGRAVATED ROBBERY" in that he, the said Grover L. Breeding, on the ___ day of November, 1995, in said Putnam County, West Virginia, did by the threat of presenting a firearm in and upon Jacob Persinger, an assault unlawfully aud feloniously make and he, the said Jacob Persinger, did then and there feloniously put in bodily fear the said Jacob Persinger and United States Currency in the amount of One Hundred Forty Dollars ($140.00) of the property of R S D, Inc. doing business as Seven Eleven Store number 128, then and there in the lawful custody of the said Jacob Persinger by virtue of his employment, and against his will, then and there feloniously and violently did steal, take and carry away, against the peace and dignity of the State, West Virginia Code, Chapter 61, Article 2, Section 12, as amended.

Found upon the testimony of Lt. R. L. Blankenship, duly sworn in open court to testify the truth and sent before the grand jury, this the 9 day of July, 1996.

s/_____
Prosecuting Attorney

AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

➡Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII--EXCESSIVE BAIL, FINES, PUNISHMENTS

➞Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

➞Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CHAPTER 153--HABEAS CORPUS

➞§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable

written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CHAPTER SIX--SENTENCING PROCEDURES, PLEA AGREEMENTS, AND CRIME VICTIMS' RIGHTS

PART A--SENTENCING PROCEDURES

➡§ 6A1.1. Presentence Report (Policy Statement)

(a) The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless--

(1) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(2) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the presentence report.

THE CONSTITUTION OF WEST VIRGINIA (1872)
ARTICLE III
→§ 5. Excessive Bail Not Required

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the State for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.

THE CONSTITUTION OF WEST VIRGINIA (1872)
ARTICLE III
➞§ 10. Safeguards for Life, Liberty and Property

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

THE CONSTITUTION OF WEST VIRGINIA (1872)
ARTICLE III
→§ 14. Trial of Crimes--Provisions in Interest of Accused

Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witness against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense; and there shall be awarded to him compulsory process for obtaining witnesses in his favor.

CHAPTER 27. MENTALLY ILL PERSONS
ARTICLE 6A. COMMITMENT OF PERSONS CHARGED OR CONVICTED OF A CRIME

→§ 27-6A-1. Determination of competency of defendant to stand trial and of criminal responsibility; examination; commitment

(a) Whenever a court of record, or in the instance of a defendant charged with public intoxication a magistrate or other judicial officer, believes that a defendant in a felony case or a defendant in a misdemeanor case in which an indictment has been returned, or a warrant or summons issued, may be incompetent to stand trial or is not criminally responsible by reason of mental illness, mental retardation or addiction, it may at any stage of the proceedings after the return of an indictment or the issuance of a warrant or summons against the defendant, order an examination of such defendant to be conducted by one or more psychiatrists, or a psychiatrist and a psychologist, or in the instance of an individual charged with public intoxication, an alcoholism counselor: Provided, That with the exception of subsections (a) and (g) of this section, no other subsection in this section nor any other provision of this article shall apply to individuals charged with public intoxication pursuant to section nine, article six, chapter sixty of this code.

(b) After the examination described in subsection (a) of this section, the court of record may order that the person be admitted to a mental health facility designated by the director of health for a period not to exceed twenty days for observation and further examination if the court has reason to believe that such further observation and examination are necessary in order to determine whether

mental illness, mental retardation or addiction have so affected a person that he is not competent to stand trial or not criminally responsible for the crime or crimes with which he has been charged. If, before the expiration of such twenty-day period, the examining physician believes that observation for more than twenty days is necessary, he shall make a written request to the court of record for an extension of the twenty-day period specifying the reason or reasons for which such further observation is necessary. Upon the receipt of such request, the court of record may by order extend said observation period, but in no event shall the period exceed forty days from the date of the initial court order of observation.

(c) At the conclusion of each examination or observation period provided for herein, the examining psychiatrists, or psychiatrist and psychologist, shall forthwith give to the court of record a written signed report of their findings on the issue of competence to stand trial or criminal responsibility. Such report shall contain an opinion, supported by clinical findings, as to whether the defendant is in need of care and treatment.

(d) Within five days after the receipt of the report on the issue of competency to stand trial, or if no observation pursuant to subsection (b) of this section has been ordered, within five days after the report on said issue following an examination under subsection (a) of this section, the court of record shall make a finding on the issue of whether the defendant is competent for trial. A finding of incompetence for trial shall require proof by a preponderance of the evidence. Notice of such findings shall be sent to the prosecuting attorney, the defendant

and his counsel. If the court of record orders or if the defendant or his counsel on his behalf within a reasonable time requests a hearing on such findings, a hearing in accordance with section two of this article shall be held by the court of record within ten days of the date such finding or such request has been made.

(e) After a conviction and prior to sentencing, the court of record may order a psychiatric or other clinical examination and, after such examination, may further order a period of observation in a mental health facility designated by the director of health. Such a period of observation or examination shall not exceed forty days.

If after hearing conducted pursuant to the procedures prescribed in subsection (c), section four, article five of this chapter, the court of record makes the findings specified in section four, article five of this chapter or finds that the convicted individual would benefit from treatment in a mental health facility, the court may enter an order of commitment in accord with section four, article five for treatment in a mental health facility designated by the director of health.

(f) In like manner, in accordance with procedures set forth in subsections (a), (b) and (c) of this section, a juvenile court may order a psychiatric examination or a period of observation for an alleged delinquent or neglected juvenile in a mental health facility to aid the court in its disposition. The period of observation shall not exceed forty days.

(g) On and after midnight on the last day of June, one thousand nine hundred eighty-three, if a person charged

with public intoxication is incapacitated at the time a warrant or summons is issued, the court, magistrate or other judicial officer may as provided by article six, chapter sixty of this code, order the individual detained in the nearest mental health facility providing appropriate care, or other detention facility as defined in section fourteen, article one of this chapter, to determine the individual's competence to stand trial and criminal responsibility and require the preparation and submission by that facility of a report which shall in addition to determining the individual's competence and criminal responsibility shall also describe any suggested or proposed methods of care or treatment which may be appropriate. Such order shall stipulate the return of the individual to the court, magistrate or other judicial officer or his release if bond has been posted or a summons issued in lieu of a warrant, when the individual is no longer incapacitated. But in no case may the individual be kept longer than forty-eight hours, unless during the forty-eight hours, civil commitment proceedings pursuant to article five of this chapter are initiated by qualified personnel at the mental health facility or other facility in which the individual is detained and detention is ordered pursuant to article five of this chapter: Provided, That whenever the director of the facility initiates civil proceedings within forty-eight hours, he shall immediately notify the judicial officer who ordered the individual detained that such proceedings have commenced: Provided, however, That the judicial officer may then modify his order and may continue the criminal proceedings in his court until a diagnosis of alcoholism has been made: Provided further, That once a diagnosis is made, the judicial officer shall find the individual not guilty by reason of addiction as provided

by section nine, article six, chapter sixty of the code and shall immediately initiate civil commitment proceedings unless such proceedings have already begun and are proceeding:

(1) If at any time during the forty-eight hours the individual requires acute medical care or because of overtly dangerous behavior needs security beyond the capability of the mental health facility where he is being detained, the sheriff of the county in which the facility is located shall at the request of the facility director transport the individual to a more appropriate facility such as a general hospital, or a state hospital or detention facility selected by said director.

(2) No law-enforcement officer, physician, mobile intensive care paramedic, emergency medical service attendant or staff member or employee of any mental health facility, hospital or detention facility may be held criminally liable for carrying out any provision set forth in this subsection or any procedure specified therein or be held civilly liable in damages to an incapacitated person because of carrying out any provision set forth in this subsection or any procedure specified herein for dealing with an individual charged with public intoxication unless for gross negligence or willful or wanton injury.

(3) Any person who is given transportation to or from, or who is examined or treated at, a mental health facility, hospital or detention facility in accordance with, and because of, the provisions of this section, whether such person was incapacitated or not or whether he gave his consent or not, shall be liable in implied contract to

the person who, or mental health facility, hospital or detention facility or other appropriate agency which, provided such transportation, examination or treatment, for the reasonable cost thereof. No person may be denied such services because of inability or failure to pay such costs nor shall any effort be made to obtain prepayment of such costs or any portion thereof.

CHAPTER 27. MENTALLY ILL PERSONS
ARTICLE 6A. COMMITMENT OF PERSONS CHARGED OR CONVICTED OF A CRIME
→§ 27-6A-2. Hearing on competency to stand trial; findings

(a) At a hearing to determine a defendant's competency to stand trial, the defendant shall be present and he or she shall have the right to be represented by counsel and introduce evidence and cross-examine witnesses. The defendant shall be afforded timely and adequate notice of the issues at the hearing and shall have access to a summary of the medical evidence to be presented by the state. The defendant shall have the right to an examination by an independent expert of his or her choice and testimony from such expert as a medical witness on his or her behalf. All rights generally afforded a defendant in criminal proceedings shall be afforded to a defendant in such competency proceedings except trial by jury.

CHAPTER 53. EXTRAORDINARY REMEDIES
ARTICLE 4A. POST-CONVICTION HABEAS CORPUS
→§ 53-4A-1. Right to habeas corpus for post-conviction review; jurisdiction; when contention deemed finally adjudicated or waived; effect upon other remedies

(a) Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. Any such petition shall be filed with the clerk of the supreme court of appeals, or the clerk of any circuit court, said supreme court of appeals and all circuit courts of this State having

been granted original jurisdiction in habeas corpus cases by the Constitution of this State, or with the clerk of any court of record of limited jurisdiction having criminal jurisdiction in this State. Jurisdiction is hereby conferred upon each and every such court of record of limited jurisdiction having criminal jurisdiction (hereinafter for convenience of reference referred to simply as a "statutory court") to refuse or grant writs of habeas corpus ad subjiciendum in accordance with the provisions of this article and to hear and determine any contention or contentions and to pass upon all grounds in fact or law relied upon in support thereof in any proceeding on any such writ made returnable thereto in accordance with the provisions of this article. All proceedings in accordance with this article shall be civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case.

(b) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

(c) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver. When any such contention or contentions and grounds could have been advanced by the petitioner before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, but were not in fact so advanced, there shall be a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds.

(d) For the purposes of this article, and notwithstanding any other provisions of this article, no such contention or contentions and grounds shall be deemed to have been previously and finally adjudicated or to have been waived where, subsequent to any decision upon the merits thereof or subsequent to any

proceeding or proceedings in which said question otherwise may have been waived, any court whose decisions are binding upon the supreme court of appeals of this State or any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or the Constitution of West Virginia, or both, impose upon State criminal proceedings a procedural or substantive standard not theretofore recognized, if and only if such standard is intended to be applied retroactively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) The writ of habeas corpus ad subjiciendum provided for in this article is not a substitute for nor does it affect any remedies which are incident to the criminal proceedings in the trial court or any remedy of direct review of the conviction or sentence, but such writ comprehends and takes the place of all other common law and statutory remedies, including, but not limited to, the writ of habeas corpus ad subjiciendum provided for in article four of this chapter, which have heretofore been available for challenging the validity of a conviction or sentence and shall be used exclusively in lieu thereof: Provided, that nothing contained in this article shall operate to bar any proceeding or proceedings in which a writ of habeas corpus ad subjiciendum is sought for any purpose other than to challenge the legality of a criminal conviction or sentence of imprisonment therefor. A petition for a writ of habeas corpus ad subjiciendum in accordance with the provisions of this article may be filed at any time after the conviction and sentence in the criminal proceedings have been rendered and imposed and the time for the taking of an appeal with respect

thereto has expired or the right of appeal with respect thereto has been exhausted.

CHAPTER 62. CRIMINAL PROCEDURE
ARTICLE 12. PROBATION AND PAROLE
→§ 62-12-13. Powers and duties of board; eligibility for parole; procedure for granting parole

(a) The board of parole, whenever it is of the opinion that the best interests of the state and of the inmate will be served, and subject to the limitations hereinafter provided, shall release any inmate on parole for terms and upon conditions as are provided by this article.

(b) Any inmate of a state correctional center is eligible for parole if he or she:

(1)(A) Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be, except that in no case is any person who committed, or attempted to commit a felony with the use, presentment or brandishing of a firearm, eligible for parole prior to serving a minimum of three years of his or her sentence or the maximum sentence imposed by the court, whichever is less: *Provided,* That any person who committed, or attempted to commit, any violation of section twelve, article two, chapter sixty-one of this code, with the use, presentment or brandishing of a firearm, is not eligible for parole prior to serving a minimum of five years of his or her sentence or one third of his or her definite term sentence, whichever is greater. Nothing in this section applies to an accessory before the fact or a principal in the second degree who has been convicted as if he or she were a principal in the first degree if, in the commission of or in the attempted commission of the felony, only the principal in the first degree used,

presented or brandished a firearm. No person is ineligible for parole under the provisions of this subdivision because of the commission or attempted commission of a felony with the use, presentment or brandishing of a firearm unless such fact is clearly stated and included in the indictment or presentment by which the person was charged and was either: (i) Found by the court at the time of trial upon a plea of guilty or nolo contendere; or (ii) found by the jury, upon submitting to the jury a special interrogatory for such purpose if the matter was tried before a jury; or (iii) found by the court, if the matter was tried by the court without a jury.

For the purpose of this section, the term "firearm" means any instrument which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive, gunpowder or any other similar means.

(B) The amendments to this subsection adopted in the year one thousand nine hundred eighty-one:

(i) Apply to all applicable offenses occurring on or after the first day of August of that year;

(ii) Apply with respect to the contents of any indictment or presentment returned on or after the first day of August of that year irrespective of when the offense occurred;

(iii) Apply with respect to the submission of a special interrogatory to the jury and the finding to be made thereon in any case submitted to the jury on or after the first day of August of that year or to the

requisite findings of the court upon a plea of guilty or in any case tried without a jury: *Provided,* That the state gives notice in writing of its intent to seek such finding by the jury or court, as the case may be, which notice shall state with particularity the grounds upon which the finding will be sought as fully as such grounds are otherwise required to be stated in an indictment, unless the grounds therefor are alleged in the indictment or presentment upon which the matter is being tried; and

(iv) Does not apply with respect to cases not affected by the amendments and in such cases the prior provisions of this section apply and are construed without reference to the amendments.

Insofar as the amendments relate to mandatory sentences restricting the eligibility for parole, all matters requiring a mandatory sentence shall be proved beyond a reasonable doubt in all cases tried by the jury or the court.

(2) Is not in punitive segregation or administrative segregation as a result of disciplinary action;

(3) Has maintained a record of good conduct in prison for a period of at least three months immediately preceding the date of his or her release on parole;

(4) Has submitted to the board a written parole release plan setting forth proposed plans for his or her place of residence, employment and, if appropriate, his or her plans regarding education and post-release counseling and treatment, the parole release plan having

been approved by the Commissioner of Corrections or his or her authorized representative; and

(5) Has satisfied the board that if released on parole he or she will not constitute a danger to the community.

(c) Except in the case of a person serving a life sentence, no person who has been previously twice convicted of a felony may be released on parole until he or she has served the minimum term provided by law for the crime for which he or she was convicted. No person sentenced for life may be paroled until he or she has served ten years, and no person sentenced for life who has been previously twice convicted of a felony may be paroled until he or she has served fifteen years: *Provided,* That no person convicted of first degree murder for an offense committed on or after the tenth day of June, one thousand nine hundred ninety-four, is eligible for parole until he or she has served fifteen years.

(d) In the case of a person sentenced to any state correctional center, it is the duty of the board, as soon as a person becomes eligible, to consider the advisability of his or her release on parole.

(e) If, upon consideration, parole is denied, the board shall promptly notify the inmate of the denial. The board shall, at the time of denial, notify the person of the month and year he or she may apply for reconsideration and review. The board shall at least once a year reconsider and review the case of every inmate who was denied parole and is still eligible: *Provided,* That the board may reconsider and review parole eligibility any time within

three years following the denial of parole of a person serving a life sentence.

(f) Any person serving a sentence on a felony conviction who becomes eligible for parole consideration prior to being transferred to a state correctional center may make written application for parole. The terms and conditions for parole consideration established by this article apply to such inmates.

(g) The board shall, with the approval of the Governor, adopt rules governing the procedure in the granting of parole. No provision of this article and none of the rules adopted hereunder are intended or may be construed to contravene, limit or otherwise interfere with or affect the authority of the Governor to grant pardons and reprieves, commute sentences, remit fines or otherwise exercise his or her constitutional powers of executive clemency.

(h) The Division of Corrections is charged with the duty of supervising all probationers and parolees whose supervision may have been undertaken by this state by reason of any interstate compact entered into pursuant to the uniform act for out-of-state parolee supervision.

(i)(1) When considering an inmate of a state correctional center for release on parole, the parole board panel considering the parole is to have before it an authentic copy of or report on the inmate's current criminal record as provided through the West Virginia State Police, the United States Department of Justice or other reliable criminal information sources and written

reports of the warden or superintendent of the state correctional center to which such inmate is sentenced:

(i) On the inmate's conduct record while in custody, including a detailed statement showing any and all infractions of disciplinary rules by the inmate and the nature and extent of discipline administered therefor;

(ii) On improvement or other changes noted in the inmate's mental and moral condition while in custody, including a statement expressive of the inmate's current attitude toward society in general, toward the judge who sentenced him or her, toward the prosecuting attorney who prosecuted him or her, toward the policeman or other officer who arrested the inmate and toward the crime for which he or she is under sentence and his or her previous criminal record;

(iii) On the inmate's industrial record while in custody which shall include: The nature of his or her work, occupation or education, the average number of hours per day he or she has been employed or in class while in custody and a recommendation as to the nature and kinds of employment which he or she is best fitted to perform and in which the inmate is most likely to succeed when he or she leaves prison;

(iv) On physical, mental and psychiatric examinations of the inmate conducted, insofar as practicable, within the two months next preceding parole consideration by the board.

(2) The board panel considering the parole may waive the requirement of any report when not available

or not applicable as to any inmate considered for parole but, in every such case, shall enter in the record thereof its reason for the waiver: *Provided,* That in the case of an inmate who is incarcerated because the inmate has been found guilty of, or has pleaded guilty to a felony under the provisions of section twelve, article eight, chapter sixty-one of this code or under the provisions of article eight-b or eight-c of said chapter, the board panel may not waive the report required by this subsection and the report is to include a study and diagnosis including an on-going treatment plan requiring active participation in sexual abuse counseling at an approved mental health facility or through some other approved program: *Provided, however,* That nothing disclosed by the person during the study or diagnosis may be made available to any law-enforcement agency, or other party without that person's consent, or admissible in any court of this state, unless the information disclosed indicates the intention or plans of the parolee to do harm to any person, animal, institution or to property. Progress reports of outpatient treatment are to be made at least every six months to the parole officer supervising the person. In addition, in such cases, the parole board shall inform the prosecuting attorney of the county in which the person was convicted of the parole hearing and shall request that the prosecuting attorney inform the parole board of the circumstances surrounding a conviction or plea of guilty, plea bargaining and other background information that might be useful in its deliberations.

(j) Before releasing any inmate on parole, the board of parole shall arrange for the inmate to appear in person before a parole board panel and the panel may examine and interrogate him or her on any matters pertaining to

his or her parole, including reports before the board made pursuant to the provisions hereof: *Provided*, That an inmate may appear by video teleconference if the members of the panel conducting the examination are able to contemporaneously see the inmate and hear all of his or her remarks and if the inmate is able to contemporaneously see each of the members of the panel conducting the examination and hear all of the members' remarks. The panel shall reach its own written conclusions as to the desirability of releasing the inmate on parole and the majority of the panel considering the release shall concur in the decision. The warden or superintendent shall furnish all necessary assistance and cooperate to the fullest extent with the parole board. All information, records and reports received by the board are to be kept on permanent file.

(k) The board and its designated agents are at all times to have access to inmates imprisoned in any state correctional center or in any city, county or regional jail in this state and shall have the power to obtain any information or aid necessary to the performance of its duties from other departments and agencies of the state or from any political subdivision thereof.

(l) The board shall, if so requested by the Governor, investigate and consider all applications for pardon, reprieve or commutation and shall make recommendation thereon to the Governor.

(m) Prior to making a recommendation for pardon, reprieve or commutation and prior to releasing any inmate on parole, the board shall notify the sentencing

judge and prosecuting attorney at least ten days before the recommendation or parole.

(n) Any person released on parole shall participate as a condition of parole in the litter control program of the county to the extent directed by the board, unless the board specifically finds that this alternative service would be inappropriate.

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FAX (304) 345-3312

PSYCHIATRIC FORENSIC EVALUATION

NAME:	Grover Lee Breeding
DOB:	7/12/51
AGE:	44 years
SS #:	320-46-9899
ATTN:	Circuit Court of Putnam County Honorable O.C. Spalding, Judge
CURRENT CHARGES:	One count of aggravated robbery.
RECORDS REVIEWED:	Psychological database compiled by Nina L. Shinaberry dated 6/18/96; no other medical records available for review at this time. Also reviewed is the investigative report compiled by Putnam County Sheriff's Department.

DATE OF EVALUATION: 6/25/96

IDENTIFICATION: Grover Lee Breeding is a 44-year-old, twice divorced, white male who is currently incarcerated at the South Central Regional Jail. Mr. Breeding is made aware of the fact that this evaluation today is for the sole purpose of determination of criminal responsibility and competency to stand trial. It is made clear to Mr. Breeding that no treatment will be offered otherwise. Mr. Breeding is made aware of the fact that the evaluation is to be tape recorded, and that all information obtained during this evaluation will be forwarded to the appropriate legal authorities. Mr. Breeding is reminded that he has the constitutional right not to make any statements that might incriminate him in any way, and that do to the lack of confidentiality of this evaluation, all information obtained may be used against him in a court of law. Given these parameters, Mr. Breeding was agreeable to the evaluation.

HISTORY: Mr. Breeding describes a long history of psychiatric illness beginning approximately in 1973. He describes that at the age of 21 he had a "nervous breakdown." He reports being treated in an inpatient psychiatric hospital, which he called "Ravenswood," which is located in Chicago, Illinois. At that time he describes symptoms consistent with a possible psychotic depression including depressed mood, paranoia, auditory hallucinations, and thoughts of suicide. He does report subsequent treatment after a suicide attempt approximately 15 years ago. At that time he reports taking an overdose of medication and being hospitalized at CAMC General Hospital and being treated on the Behavioral Medicine Unit, Mr, Breeding reports being

treated twice at St. Albans Hospital in Radford, Virginia. He has also been in and out of the Shawnee Hills Mental Health Center system for many years including several treatment episodes at the Threshold Drug and Alcohol Treatment Center. Mr. Breeding reports that he was treated by Dr. Knapp in Charleston for quite some time as an outpatient. He reports that during that time he did receive antidepressant and antipsychotic medication and reportedly did well as long as he was taking the medicine. Mr. Breeding also reports a history of being treated in the psychiatric ward at Moundsville Prison where he was incarcerated for approximately six months by his lewd for aggravated robbery. Most recently, Mr. Breeding has been seen by Dr. Tim Thistlethwaite at the South Central Regional Jail and was, for a time, placed on the Medical Unit ostensibly to treat psychotic symptoms.

Currently Mr. Breeding is describing having a depressed mood. He reports that he feels "anxious and shaky." He reports increased crying episodes, diminished ability to sleep, decreased energy, feelings of hopelessness, "I feel empty inside without meaning." He admits to suicidal thought. When pressed on this issue, he did state that as long as he felt he was receiving adequate treatment, he would not act on these thoughts at this time. He does report that he has auditory hallucinations, reporting voices that usually call his name and, at times, are of a command nature telling him to kill himself.

In the past he reports having had periods of increased energy, diminished need for sleep for three to four days at a time. He reports during these periods having racing thoughts, grandiose delusions, "I feel elevated like I'm going 90 miles an hour." He reports impulsive behavior

including increased drug and alcohol use, hypersexual behavior, spending sprees, noting that he often spends his money on cars, drugs, and "pretty girls."

Mr. Breeding has a very long substance abuse history. He reports beginning using alcohol and drugs around the age of 13. He reports that he began drinking very heavily at about age 17. At the heaviest times, he reports drinking approximately a fifth of whiskey, 12 beers, and smoking unknown quantities of marijuana on a daily basis. He also reports a heavy use of crank/methamphetamine in the past. He describes using it intranasally as well as smoking it. He denies ever using I.V. drugs. He does describe a history of blackout as well as withdrawal symptoms including hallucinations, feeling shaky and nervous, feeling confused, and having had withdrawal seizures on several occasions. He reports that he has been in and out of treatment multiple times for substance abuse primarily as an outpatient, although he does note that he has been in Threshold several times. He has several legal problems resulting from his drug and alcohol use including several DUI arrests and several public intoxication arrests. He reports that his two marriages also have ended in divorce primarily due to his substance abuse and his abusive behavior while he was using drugs and alcohol.

PAST MEDICAL HISTORY: Mr. Breeding denies any history of major surgeries. He does describe having a back injury for which he has been treated medically.

REVIEW OF SYSTEMS: Positive for "dizzy spells."

CURRENT MEDICATIONS: Mellaril 15 mgs b.i.d.; Desyrel 50 mgs q.h.s.; unknown medication that he takes every morning, which by his description is likely Prozac 20 mgs.

DRUG ALLERGIES: None reported.

FAMILY HISTORY: Patient describes having a brother who "went crazy" and was reportedly institutionalized. Reports also a maternal uncle who also "went crazy" and was also institutionalized.

PSYCHOSOCIAL HISTORY: Mr. Breeding was born in Man, West Virginia, and raised in the Kanawha County area He describes being the youngest of four children and being raised by his biologic parents. He describes no history of physical, emotional, or sexual abuse as a child. He reports having an eighth-grade education stating that he quit school due to the fact that he was using drugs and alcohol fairly heavily at that time. He reports never obtaining a GED. As far as work is concerned, Mr. Breeding reports intermittently working as a carpet installer, but has never had any regular employment. He reports he receives no extra benefits such as Social Security or pensions. He is supported primarily through his family, usually his mother. He reports no military history and no attempts to join the military.

Mr. Breeding has been married twice. The first time for approximately seven years, second time for approximately three years. He reports having no children. He does admit to a history of being physically abusive and violent with both women. He has been

arrested on battery and domestic violence charges in the past.

With regards to legal history, Mr. Breeding notes that he has been arrested twice for DUI and has had his license revoked. He has had two to three battery charges. He reports several public intoxication arrests, and also being arrested twice now for aggravated robbery.

MENTAL STATUS EXAMINATION: Mr. Breeding is dressed in orange jail clothing and is in handcuffs and ankle shackles. He is accompanied to the interview by a Sheriff's deputy. He is cooperative and pleasant throughout the interview. He is alert and oriented times four. His psychomotor activity is normal. He is noted to have four tattoos, two on each arm. He relates that these tattoos have "death" as a meaning to him. It is noted that they are primarily skulls usually with some type of motorcycle insignia attached to them. He describes his mood as "I've been in a bad mood all day." He does report having suicidal thought at this time, but did make an antisuicide contract with this interviewer stating that he would not act on these thoughts presently. He reports that he has had thoughts of hurting others, "I have a lot of anger built up inside." He denies any present plans to focus on any one individual, and denies any specific plans to commit homicide. He reports auditory hallucinations at this time. Overtly there is no obvious sign that he is tending to internal stimuli. His affect is fairly flat, although at times he does smile appropriately. Cognitive functioning—memory is intact to recent and remote events. He was able to recall presidents back as far as Carter in order, and was able to recall President Reagan's wife's name. His immediate recall is excellent at

four out of four after five minutes. His concentration was poor to spelling of words forward and reverse, but this may be secondary to poor education more than it is to concentration impairment. Insight regarding judicial process is excellent. Specifically Mr. Breeding is able to understand the concept of plea bargain and explained this to me in detail including a present plea bargain offer that he has been given. He has described meeting with an attorney and attempting to formulate a defense at this point. He understands the roll of all court officers and the potential consequences if he is found guilty of his current charge.

With regards to specifics regarding the events of the alleged crime, Mr. Breeding is able to tell me the date of the alleged crime. He can tell me the victim and the amount of money that was apparently taken. On the day of the crime he reports that he had been using multiple medications including Fioricet, Soma, as well as beer, whiskey, and marijuana. He reports that he had a blackout and cannot recall any events after this. He does note that he awakened the next day and discovered having $140.00 that he could not account for. He reports that he became aware that he had robbed a store after he saw his picture on the television news. He reports that he was planning to turn himself in, however, the police apparently apprehended him before he did so.

IMPRESSION:

Axis I: 1. Polysubstance Dependence including dependence on alcohol, marijuana, and methamphetamine. Currently in remission secondary to incarceration. (304.80)

2. Probable Bipolar Affective Disorder, Depressed. (296.54) Severe with psychotic features.

Axis II: Suspect Antisocial Personality Disorder.

Axis III: History of back pain, unknown etiology.

Axis IV: Stressors include pending legal charges and current incarceration as well as chronic mental illness.

Axis V: Current GAF: 55-60

RECOMMENDATIONS/DISCUSSION

1. With regard to current competency, it is my opinion that although Mr. Breeding continues to suffer from a fairly severe mood disorder, his symptoms are not impairing his ability to understand the wrongfulness of his acts, nor is it impairing his ability to appropriately understand the judicial process to any significant degree. He appears to have an excellent understanding of the law and his current status. Thus far he has apparently been able to work appropriately with his own defense attorney to formulate an appropriate defense. I see at this point no evidence to suggest that he is not competent to stand trial. I am concerned about his continued problems with severe depression, and further treatment will be deferred to the treating psychiatrist at South Central Regional Jail. I have made recommendations to the South Central Regional Jail Treatment staff that Mr. Breeding should be watched for potential suicidal behavior.

2. With regard to criminal responsibility, again although Mr. Breeding has a severe and chronic mental illness, it does not appear that this illness impaired his ability to conform his behavior to appropriate social and legal

norms. He, of his own free will and choice, ingested multiple substances which may indeed have caused an inability for him to recall events. However, as per legal standards, this would not render him irresponsible for his own actions. Mr. Breeding's chronic substance abuse problem certainly plays a role in his poor judgement, however, he clearly was able to understand the potential consequences of continuing to use substances as is evidenced by the fact that he today clearly indicated to me the knowledge that he had violated probation by using marijuana and had voluntarily agreed to sign himself into a treatment program just prior to his committing this act of robbery. It is my opinion, therefore, that based on the information available at this time, that Mr. Breeding was responsible for his own actions at the time of the alleged crime.

I am aware that there are multiple medical records that have not been made available as of yet for review. We will certainly review these in detail and if any change in opinion is forthcoming, we will certainly notify the appropriate authorities immediately.

Thank you very much for the referral of this very interesting case. If there are questions regarding this report, feel free to contact my office.

Sincerely,

s/_____

Daniel B. Thistlethwaite, M.D.
Diplomate American Board of Psychiatry and Neurology
Diplomate American Board of Forensic Examiners

DBT/am

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

GROVER LEE BREEDING,

Petitioner,

v. **Civil Action No.:99-C-123**
Judge O.C. Spaulding

HOWARD PAINTER, Warden,

Respondent.

AMENDED OMNIBUS PETITION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

Comes Now the Petitioner, Grover Lee Breeding, by counsel, D. Scott Bellomy, and moves for a Writ of Habeas Corpus to be issued by this Court.

Petitioner seeks relief from his incarceration as a result of the sentence of incarceration he received in the case of *State of West Virginia v. Grover Lee Breeding*, Indictment No. 96-F-61, in the Circuit Court of Putnam County, West Virginia.

Following a trial held on the 31st day of October, 1996, the Petitioner, Grover Lee Breeding, was found guilty of one count of aggravated robbery. The Petitioner was sentenced to a term of seventy-five (75) years imprisonment. It is from this sentence that the Petitioner seeks relief.

In this Petition for Writ of Habeas Corpus, Petitioner identifies the following grounds for relief from his sentence, pursuant to *Losh* list filed herein as the "CHECKLIST OF GROUNDS ASSERTED OR WAIVED IN POST-CONVICTION HABEAS CORPUS PROCEEDING":

1. Ineffective Assistance of Counsel;

2. Incapacity to Stand Trial Due to Drug Use;

3. Mental Competency at Time of the Crime;

4. Erroneous Presentence Report;

5. Excessive Sentence.

The Petitioner respectfully asserts that he was denied substantial constitutional or fundamental rights in each of these categories enumerated above, that he was the victim of harmful constitutional error and that "but for" said deprivations of rights and errors the Petitioner would not currently be serving such a lengthy term of incarceration, if at all.

In support of this Amended Petition, the Petitioner causes to be filed herewith or shortly hereafter, his Memorandum in Support of Amended Omnibus Petition for a Writ of Habeas Corpus Ad Subjiciendum which considers the particulars of each of these assertions of the Petitioner and the law applied to each.

WHEREFORE, Petitioner respectfully requests that any and all relief available to him in this action be

granted unto him with due speed, including his release from incarceration, a reduction of his sentence and any other relief whatsoever.

Grover Lee Breeding
By Counsel

s/_____

D. Scott Bellomy, Esq. (#8028)
Bellomy & Turner
418 8th Street, Suite 105
Huntington, West Virginia 25701

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v. **Case No.: 99-C-123**
Judge: O.C. Spaulding

GROVER LEE BREEDING,
Petitioner.

Petitioner's Memorandum

COMES NOW the Petitioner, Grover Lee Breeding, by counsel D. Scott Bellomy, and submits this brief to the presiding Judge, and asserts as follows:

1. Following a one-day trial on the 31st day of October, 1996. The Petitioner was found guilty of aggravated robbery. Subsequently the Petitioner was sentenced to seventy-five (75) years imprisonment.

2. On the 31st day of August, 2001 the Petitioner, through counsel, filed and Amended Omnibus Petition for a Writ of Habeas Corpus Ad Subjiciendum.

3. On the 1st day of April, 2002 and during subsequent hearings this Court heard evidence to establish the Grover Lee Breeding is held illegally.

4. Grover Lee Breeding was unable to assist in his defense due to drugs prescribed and administered by the jail. Testimony established Grover Lee Breeding that mellaril, desyrel and prozac have common adverse reactions including: sedation, blurred vision and drowsiness. The Petitioner testified he suffered from said side effects and was unable to participate in his defense at trial. Greg Courtright, however, testified the Petitioner did not suffer from said side effects.

5. The Petitioner's testimony established Mr. Courtright rendered ineffective assistance of counsel. The Petitioner testified that Mr. Courtright's performance was deficient in that he failed to meet with the Petitioner, in that he failed to properly investigate the case, and failed to assert the Petitioner's mental defense as the Petitioner demanded. Obviously, the Petitioner was prejudiced by Mr. Courtright's ineffectiveness. In fact, the Petitioner did not receive the mental defense he demanded.

6. The Petitioner's testimony established his due process rights were violated by meeting with him without counsel being present. *See, U.S. v. Herrera-Figueroa*, 918 F.2d 1430 (1991), Franklin D. Cleckley, 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure, II*, 312, 2d. ed (1993). Thus, the Petitioner's sentencing was in violation of due process. Further, Mr. Courtright's failure to propose a proper remedy

with this problem was more evidence of Mr. Courtright's ineffectiveness as counsel.

7. Finally, the Petitioner asserts that his sentence is excessive pursuant to *Article III, § 5* of the West Virginia Constitution. Robbery, pursuant to *W.Va. Code § 6-2-12* is a determinate sentence to be chosen by the presiding judge not less than ten (10) years. Thus, a person convicted of robbery potentially faces incarceration for a longer period than a person convicted of murder. Thus, the Petitioner asserts that the seventy-five (75) year sentence in this case is disproportionate based upon objective factors with West Virginia Common Law. *But see, State v. Adams*, No. 29960, (W.Va. 2/11/02).

WHEREFORE, based upon the evidence adduced the Petitioner requests that this Court vacate the seventy-five (75) year sentence and re-sentence the Petitioner to a proportionate term of years.

Grover Lee Breeding,
By counsel

s/
D. Scott Bellomy, Esq. (#8028)
Counsel for the Petitioner
BELLOMY & TURNER
418 8th Street, Suite 105
Huntington, WV 25701
Telephone: (304) 697-7200
Fax: (304) 697-4102

CERTIFICATE OF SERVICE

I, D. Scott Bellomy, counsel for the Petitioner, Grover Lee Breeding, does hereby certify that he has served the forgoing **"Petitioner's Memorandum"** is a true and exact copy sent this 30th day of May, 2002 via United States Mail, postage prepaid, to the following:

Mark Sorsaia
Putnam County Prosecuting Attorney
Putnam County Judicial Bldg.
3389 Winfield Road
Winfield, WV 25213

Hon. O.C. Spaulding, Chief
Putnam County Judicial Bldg.
3389 Winfield Road
Winfield, WV 25213

s/
D. Scott Bellomy, Esq. (#8028)
Counsel for the Petitioner
BELLOMY & TURNER
418 8th Street, Suite 105
Huntington, WV 25701
Telephone: (304) 697-7200
Fax: (304) 697-4102

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

SER. GROVER LEE BREEDING,

Petitioner,

VS. SUPREME COURT CASE NO:__
Underlying Civil Case No. 99-C-123.

HON. O.C. SPAULDING, JUDGE.,
29TH JUDICIAL CIRCUIT,
N. EDWARD EAGLOSKI, ESQ.,
COURT APPOINTED COUNSEL.,

Respondent's.

PETITION FOR A WRIT OF MANDAMUS

I. JURISDICTION

Comes now, Grover Lee Breeding, (hereinafter the petitioner) by pro se and contends the West Virginia Supreme Court of Appeals (hereinafter WVSCA) is knowledgeable pursuant to W.Va. Code § 53-1-2 and § 53-1-3, which provides this Court jurisdiction to review and rule upon the above styled petition in the instant case which originates in the Circuit Court of Putnam County in Winfield. Thus, pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure, the provisions of Chapter 51, Article 1, Section 3 of the West Virginia Code and Article 8, Section 3 of the West Virginia Constitution petitioner moves for entertainment

of said petition, invoking the original jurisdiction of this Court to take action.

II. STATEMENT OF FACTS

In November of 1995 petitioner allegedly committed the felony offense of aggravated robbery and was subsequently arrested for one count of aggravated robbery in violation of W.Va. Code § 61-2-12.

In March of 1996 petitioner was indicted by the grand Jury sitting in the Circuit Court of Putnam County for one count of aggravated robbery.

On October 31, 1996, petitioner was convicted by a jury of aggravated robbery.

On December 20, 1996, petitioner was sentenced to seventy-five years in the West Virginia Penitentiary at Mt. Olive by Hon. O.C. Spaulding, Judge.

On June 23, 1997, petitioner by court appointed trial counsel who had previously filed a Notice of Intent to Appeal, Appellate Transcript Request and Motion for Extension of Time, subsequently filed a direct petition for appeal upon the WVSCA which was ruled timely filed. In September 1993, petitioner's petition for appeal is denied review by the WVSCA.

On February 28, 1999, petitioner filed a pro se letter for appointment of habeas counsel to perfect a petition for a writ of habeas corpus pursuant to the W.Va. Post Conviction Habeas Corpus Act (W.Va. Code § 53-4A-I) upon the Putnam County Circuit Court.

On April 22, 1999, Hon. O.C. Spaulding, Judge, entered an Order granting said letter motion and appointed, N. Edward Eagloski, Esq., to investigate petitioner's case, prepare and file a petition for a writ of habeas corpus. (See Exhibit A attached hereto). Said Order states Counselor Eagloski shall review with the petitioner all potential grounds for relief utilizing the comprehensive checklist described in Losh v. McKenzie, 166 W.Va. 762 (1981), so that an omnibus habeas corpus hearing may be held in this matter and all potential claims considered.

On April 6, 2000, petitioner filed a ethics complaint against Counselor Eagloski upon the Office of Disciplinary Counsel and a Motion to Disqualify Counsel upon the Putnam County Circuit Court. Said filings were based upon Counselor Eagloski's failure to take any legal action through post conviction procedures on behalf of petitioner in over one (1) year. Also as of this date the lower Court has not ruled upon said Motion to Disqualify Counselor Eagloski by appointing new counsel of record.

In April, 2000, Counselor Eagloski immediately visited petitioner at the Mt. Olive Correctional Complex to discuss this case and to request that he withdraw the ethics complaint. But at no time did counsel advise petitioner that he was a May 2000 Primary Republican Candidate for Putnam County Circuit Court Judge.

On May 5, 2000, Counselor Eagloski sent petitioner a Motion to Withdraw as Counsel and the Appointment of New Counsel with proposed orders requesting him to sign said documents. But petitioner refused to cooperate

and sign these documents based upon the fact Counselor Eagloski had failed to provide the truth within the motions about his failures to take appropriate action in this case as ordered by Hon. O.C. Spaulding, Judge. Subsequently petitioner found out counsel was running for judge by reading a newspaper article in the Charleston Gazette.

On November 8, 2000, petitioner's court appointed counsel is elected to the judgeship of the Circuit Court of Putnam County West Virginia defeating Democratic Candidate Frank Gritt.

To date petitioner contends Counselor Eagloski has failed to investigate his case and to prepare and file a post conviction petition for a writ of habeas corpus as Ordered on April 22, 1999, by Judge Spaulding. Thus, he contends W.Va. Const., Art 3, Section 17, provides that "Justice shall be administered without delay." Similary, Canon 3B (8) of the Code of Judicial Conduct requires that "A Judge shall dispose of all judicial matters promptly, efficiently, and fairly." And he has presented viable grounds for post conviction relief pursuant to W.Va. Codes § 53-1-2, § 53-1-3 and § 53-4A-1 as stated within this petition. Thus petitioner avers as follows.

III. ARGUMENT AND DISCUSSION OF LAW

Petitioner maintains he has a legal right to a timely petition for a writ of habeas corpus and final appeal thereof if denied habeas relief in the lower Court, and respondents failure to take legal action has essentially denied him due process. "An indigent criminal defendant who desires to appeal his conviction has a right, under

Article III, Sections 10 and 17 of the West Virginia Constitution to the effective assistance of court-appointed counsel on his appeal." Syl. pt. 2, Rhodes v. Leverette, 239 S.E.2d 136 (1977); Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. at 830, 83 L.Ed.2d 821 (1985) and cases collected herein at n. 9, --- U.S. at ---, 105 S.Ct. at 837, 83 L.Ed.2d at 831. Petitioner claims the intent and purpose of the W.Va. Code § 53-4A-2 et seq. is to provide a complete forum to any person incarcerated under a State conviction and sentence to raise all state and federal constitutional issues in state courts and, thereupon, to receive a full evidentiary hearing on any and all factual questions before the appropriate state statutory or circuit court. Kidd v. Coiner, 299 F.Supp. 1380 (N.D. W.Va. 1962).

Petitioner argues he has presented viable grounds for relief and the respondents denial in abiding to the rules of the Court violates all his Due Process Rights under Article 3, Section 17 of the W.Va. Constitution and Constitutional Amendment 14 of the U.S. Constitution. Mandamus under this section, implemented by W.Va. Code § 51-1-3, will require the lower court to perform legally any administrative act required by a petitioner who shows a clear legal right to the relief which he seeks. Further, the Court has a mandatory duty to perform the act. State ex rel. Granes v. Handly, 150 W.Va. 468, 147 S.E.2d 284 (1966). He claims the WVSCA has complete power to make a decision upon the legal issues presented in this mandamus petition: In cases of Habeas Corpus, Mandamus and Prohibition which are instituted under, the original jurisdiction of the WVSCA as provided in this section. The Court will not try cases in piecemeal. It therefore becomes necessary for the Court in such an original proceeding to ascertain initially whether the

proceeding upon final submission for decision presents only an issue or issues of law. See, Board of Trustees of Policemens Pension and Relief Fund v. City of Huntington, 142 W.Va. 217, 96 S.E.2d 225 (1956) and Wiley v. State Road Commission, 148 W.Va. 76, 133 S.E.2d 113 (1963).

Therefore, petitioner asserts respondents ongoing delays have created an existence of circumstances in his post conviction rights in violation of the Order dated April 22, 1999, because respondent's failure to take action has rendered such process ineffective to protect his rights to Due Process of Law under the Constitutions of both the United States of America and State of West Virginia. Such failure indicates and proves respondents are not acting in good faith for failing to investigate, prepare and file his petition and to hold an omnibus hearing pursuant to the requirement of W.Va. Code § 53-4A-7(a) and Gibson v. Dale, 319 S.E.2d 806 (W.Va. 1984).

IV. REQUESTED RELIEF

Wherefore, petitioner prays this Honorable Court will direct respondents to forthwith take the appropriate legal action to enforce the lower Court's order dated April 22, 1999, by appointing new habeas counsel to investigate, prepare and file a petition for a writ of habeas corpus, and to essentially schedule and hold an omnibus evidentiary hearing as ordered. Thus he requests the Honorable Justices of this Court to promptly procure an Order that a Rule of Mandamus do issue directed against both respondents returnable before this Court, commanding and directing the said respondents to show cause, if any they can, why a peremptory writ of

mandamus should not be awarded against them as prayed for by the petitioner in this petition unless sooner mooted by the appropriate relief being sought deemed just and fair in the instant case at bar.

Respectfully submitted,

s/_____
Grover Lee Breeding

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SER. GROVER LEE BREEDING,

Petitioner,

VS. **SUPREME COURT CASE NO:__**
Underlying Civil Case No. 99-C-123.

HON. O.C. SPAULDING, JUDGE.,
29TH JUDICIAL CIRCUIT,
N. EDWARD EAGLOSKI, ESQ.,
COURT APPOINTED COUNSEL.,

Respondent's.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

Comes now your petitioner, Grover Lee Breeding, herein by pro se and respectfully presents unto this Honorable Court his Brief in Support and avers, as follows:

Petitioner contends W.Va. Const., Art. 3, Section 17, provides that "Justice shall be administered without...delay." Similary, Canon 3B (8) of the Code of Judicial Conduct requires that "A Judge shall dispose of all judicial matters promptly, efficiently, and fairly." Thus he has presented viable grounds for post conviction relief pursuant to W.Va. Codes § 53-1-2, § 53-1-3 and § 53-4A-1 as stated within this petition.

Petitioner maintains his has a legal right to a timely decision in this case, even an appeal thereof if the relief requested is essentially denied and also due process of law. "An indigent criminal defendant who desires to appeal his conviction has a right, under Article III, Sections 10 & 17 of the W.Va. Constitution to the effective assistance of court-appointed counsel on his appeal." Syl. pt. 2, Rhodes v. Leverette, 160 W.Va. 781, 239 S.E.2d 136 (1977); Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. at 830, 83 L.Ed.2d 821 (1985) and cases collected herein at n. 9, --- U.S. at ---, 105 S.Ct. at 837, 83 L.Ed.2d at 831. He argues he has presented viable grounds for relief and the respondent's denial in abiding to the rules of the Court violates all his Due Process Rights under Article 3, Section 17 of the W.Va. Constitution and Constitutional Amendment 14 of the U.S. Constitution. Mandamus under this section, implemented by W.Va. Code § 51-1-3, will require the lower court to perform legally any administrative act required by a petitioner who shows a clear legal right to the relief which he seeks. Further, the Court has a mandatory duty to perform the act. State ex rel. Granes v. Handly, 150 W.Va. 468, 147 S.E.2d 284 (1966). He claims this Court has complete power to make a decision upon the issues presented in his petition for a writ of mandamus and he cites the following in his arguments: In cases of Habeas Corpus, Mandamus and Prohibition which are instituted under the original jurisdiction of the Supreme Court of Appeals of West Virginia as provided in this section. The Court will not try cases in piecemeal. It therefore becomes necessary for the Court in such an original proceeding to ascertain initially whether the proceeding upon final submission for decision presents only an issue or issues of law. Board of Trustees of Policemen's Pension & Relief Fund v. City

of Huntington, 142 W.Va. 217, 96 S.E.2d 225 (1956) & Wiley v. State Road Commission, 148 W.Va. 76, 133 S.E.2d 113 (1963).

Petitioner states he has taken the necessary steps of informing this Court and the respondent's of his legal rights to a timely decision in this case based upon the exhibit attached hereto. He claims respondents ongoing delays have created an existence of circumstances in his post conviction rights to obtain adherence to the lower Court's order dated April 22, 1999, thus rendering such process ineffective to protect his rights to Due Process of Law under the Constitutions of both the United States of America and State of West Virginia.

Petitioner finally contends that only this Honorable Court can compel the respondents to take action in his case since respondents have failed in their duties to obey the law by acting in bad faith. This contention is clearly substantiated by the aforementioned petition for a writ of mandamus. So for these reasons, facts, averments and contentions made herein your petitioner prays for the issuance of a Rule of Mandamus directed against the respondent returnable before this Court, commanding and directing the said respondent's to show cause, if any they can, why a peremptory writ of mandamus should not be awarded against them as prayed for by the petitioner in this petition unless sooner mooted by the appropriate relief being sought deemed just and fair in the instant case at bar.

Respectfully submitted,
s/_____
Grover Lee Breeding

PETITION UNDER W. VA. CODE § 53-4A-1 FOR WRIT OF HABEAS CORPUS

STATE OF WEST VIRGINIA County PUTNAM
Name GROVER LEE BREEDING Prisoner No. 17561
Case No. 99-C-123

Place of Confinement
MT. OLIVE CORRECTIONAL COMPLEX
ONE MOUNTAINSIDE WAY
MT. OLIVE, WV 25185

Name of Petitioner (include name under which convicted)
GROVER L. BREEDING v.
Name of Respondent (authorized person having custody of petitioner)
THOMAS MCBRIDE, WARDEN

AMENDED PETITION

1. Name and location of court which entered the judgment of conviction under attack PUTNAM COUNTY CIRCUIT COURT, WINFIELD, WEST VIRGINIA

2. Date of judgment of conviction OCTOBER 31, 1996

3. Length of sentence SEVENTY-FIVE (75) YEARS

4. Nature of offense involved (all counts) ONE COUNT OF AGGRAVATED ROBBERY

5. What was your plea? (Check one)
(a) Not guilty X
(b) Guilty

(c) Nolo contendere
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury X
(b) Judge Only

7. Did you testify at the trial?
Yes X No

8. Did you file a direct appeal from the judgment of conviction in the Supreme Court of Appeals?
Yes No X

9. If you did appeal, answer the following:

(a) Date of filing
N/A

(b) Grounds raised

(c) Was the petition granted or refused?

(d) If refused, what was date of refusal?

(e) If granted, give date and type of result and citation, if known.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any

petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes X No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court PUTNAM COUNTY CIRCUIT COURT

(2) Nature of proceeding WRIT OF HABEAS CORPUS AD SUBJICIENDUM

(3) Grounds raised INEFFECTIVE ASSISTANCE OF COUNSEL, INCAPACITY TO STAND TRIAL DUE TO DRUG USE, MENTAL COMPETENCY AT THE TIME OF THE CRIME, ERRONEOUS INFORMATION IN PRE-SENTENCE EXCESSIVE SENTENCE

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes X No

(5) Result HABEAS CORPUS RELIEF WAS DENIED

(6) Date of result APRIL 1, 2002

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No X

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.	Yes	No X
(2) Second petition, etc.	Yes	No X

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: DIFFERENT ATTORNEYS HAVE BEEN INVOLVED IN THIS CASE AT DIFFERENT TIMES.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same. **CAUTION: In order to proceed in the circuit court, you must state grounds that have NOT been previously and finally adjudicated or waived. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.**

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled. (I) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Supporting FACTS: The first allegation is that trial counsel failed to obtain the Petitioner's records from a psychiatric hospital. The records would have allowed the psychiatrist that evaluated Mr. Breeding to offer a more informed evaluation in determining his competency at the time of the crime by examining in detail the Petitioner's long history of mental incompetence. Also, the Petitioner's counsel failed to sustain a reasonable level of investigation into Mr. Breeding's medical records that would have showed a mental ailment and/or a

diminished mental capacity. The Petitioner's previous counsel appeared at trial extremely nervous and confused which was a result from being unprepared for trial. In addition, the Petitioner's counsel failed to demand a competency hearing to determine whether the Petitioner was competent at the time the crime was committed, which resulted in a peculiar trial strategy due to the fact that the defense wanted to proceed on a competency claim but then dropped the defense because counsel failed to provide evidence of the Petitioner's history of mental illness, which resulted with the Petitioner having an undeveloped defense and no mitigating evidence that caused a serious and injurious effect on the outcome of his trial, the Defendant was convicted of aggravated robbery by the jury on October 31, 1996.

B. Ground two: INCAPACITY TO STAND TRIAL

Supporting FACTS: During trial, the Defendant was under several prescribed medications for his mental illness and depression (Mellaril, Desyrel, and Prozac) that left him oblivious to what was going on during his trial. The Petitioner's inability to understand what was going on during his trial left him unable to work with his counsel or protect himself against his counsel's ineffective assistance, which resulted in the waiving of competency. The evidence of the Petitioner's long history of mental illness could have resulted in mitigating factors to Mr. Breeding's defense. The failure to present such evidence resulted in a serious and injurious effect to the outcome of Petitioner's trial.

C. Ground three: MENTAL COMPETENCY AT TIME OF CRIME

Supporting FACTS: Due to the Petitioner's previous counsel who failed to investigate Mr. Breeding's history of mental illness and then waived a mental competency hearing resulted in his counsel's subsequent decision to remove this defense during trial. The Petitioner's mental illness in combination with voluntary intoxication led to Mr. Breeding's criminal activity, although he lacked intent and was therefore denied due process.

D. Ground four: ERRONEOUS PRE-SENTENCE REPORT

Supporting FACTS: The state knew that the Petitioner was being represented by counsel and violated the Petitioner's due process rights by failing to give counsel notice that resulted in there being no reasonable opportunity to attend any interview of the defendant by a probation officer. Therefore, any illegally obtained statements made by the Petitioner during this interview should have been excluded and not presented to the Court prior to determining the Defendant's sentence.

E. Ground five: EXCESSIVE SENTENCE

Supporting FACTS: The penalty is not proportionate for a person who has a history of mental illness, and is cruel and inhuman punishment and lacks equal protection of law and has denied this Defendant due process of law. The sentence of seventy-five years is clearly excessive when looking at the ineffective assistance of counsel's failure to adequately pursue any

mitigating evidence that would aid his client during his representation.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes No X

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing GREGORY M. COURTRIGHT, 179 SUMMERS ST., SUITE 306, CHARLESTON, WV 25301.

(b) At arraignment and plea SAME

(c) At trial SAME

(d) At sentencing SAME

(e) On appeal WAS NOT FILED IN A TIMELY MANNER

(f) In any post-conviction proceeding ED EAGLOSKI, 3734 TEAYS VALLEY ROAD, HURRICANE, WEST VIRGINIA, 25526; D. SCOTT

BELLOMY, 418 EIGHTH STREET, SUITE 201, HUNTINGTON, WEST VIRGINIA 25701.

(g) On appeal from any adverse ruling in a post-conviction proceeding YES

16. Have you, or an attorney representing you, obtained a transcript of the criminal proceedings that resulted in the conviction under attack?
Yes X No

17. If your answer to 16 was "no," have you submitted an Appellate Transcript Request form for transcripts to the circuit court, a court reporter, or any other tribunal or individual?
Yes N/A No

18. If your answer to 17 was "yes," attach a copy, if available, of the Appellate Transcript Request form and provide the name of the court or person to whom it was submitted and the date of submission.
(a) Copy of request is attached N/A
(b) Date N/A
(c) Name N/A

19. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes No X

20. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes No X

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A
(b) Give date and length of the above sentence: N/A
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment that imposed the sentence to be served in the future? Yes N/A No

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

s/_____
David L. Hill
W. Va. Bar Id # 1726
P.O. Box 506
Hurricane, WV 25526
(304) 562-2274

I declare under penalty of perjury that the foregoing is true and correct.

Executed on s/_____
(Date)

s/_____
Signature of Petitioner

CERTIFICATE OF SERVICE

I, DAVID L. HILL, Counsel for Petitioner, hereby certify that on this the 7th day of August, 2006, service of the foregoing **"Petition for a Writ of Habeas Corpus Ad Subjiciendum and Memorandum"**, was made upon the parties herein, via depositing a true and exact copy of the same in the United States Mail, postage prepaid, to the following address:

Mark A. Sorsaia
Prosecuting Attorney
Putnam County Judicial Bldg.
3389 Winfield Rd.
Winfield, WV 25213

s/_____
DAVID L. HILL (WVSB #1726)
Attorney at Law
P.O. Box 506
Hurricane, WV 25526
(304) 562-2274
(304) 562-2055 *fax*

jury trial. I, in fact, heard the evidence. I, in fact, heard the witnesses. I, in fact, saw the videotape. I mean, his statement really sheds no information on this case that would have affected my sentencing in this matter anyway.

Does the State wish to consult with probation as to the allegations? I mean, I don't want to cut anybody off. Does the State want to respond?

MR. MORRISON: Your Honor, I am absolutely sure it was an oversight on Shelia's part, not done intentional. Other than that, there's no need to consult.

As for what you do, you're right, there's no difference in the Defendant's version from the evidence you saw at trial, with the exception of the mitigating statement, which is "Well, I really don't know that I would shoot somebody. Probably would just hit them in the head if they refused to give me the money." It seems to me that's a mitigation from the circumstances were in. Other than that, there's no difference from the facts that you heard and saw at trial. So, I fail to see how he's actually prejudiced. His rights may have been violated, but how he's prejudiced by that in terms of sentencing procedure, I don't know.

THE COURT: So your request is that the Court strike from the report and from the record any statements made by your client under the category Roman Numeral 1 (b), Defendant's version, beginning at the top of Page 4.

MR. MORRISON: Agreed. No objection to strike, no problem.

MR. COURTRIGHT: Yes.

THE COURT: I'm trying to figure out when you say the

IN THE CIRCUIT COURT OF PUTNAM COUNTY
WEST VIRGINIA

GROVER LEE BREEDING,

Petitioner,

vs. CASE NO. 99-C-123

HOWARD PAINTER, Warden,

Respondent.

DONALD A. WRIGHT
CIRCUIT CLERK
PUTNAM COUNTY
APR 17 10 46 AM '07
LODGED ___
FILED ___

TESTIMONY OF GROVER BREEDING given in the Omnibus Habeas Corpus Hearing of the above-styled action before the Honorable O. C. Spaulding, Judge, on Monday, the 1st day of April, 2002.

APPEARANCES

MR. D. SCOTT BELLOMY, Attorney at Law, Huntington, West Virginia, Counsel for the Petitioner.

MR. MARK A. SORSAIA, Putnam County Prosecuting Attorney, Counsel for the Respondent.

Judith A. Greene,
Official Reporter

JUDITH A GREENE, RPR
OFFICIAL REPORTER
(304) 586-0262

GROVER BREEDING, the Petitioner herein, was thereupon called as a witness and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BELLOMY:

Q Would you state your name please?

A Grover Lee Breeding.

Q And what's your date of birth, Mr. Breeding?

A 7/12/51.

Q And where are you currently housed?

A Mount Olive Correctional Complex in Mount Olive, West Virginia.

Q And for what crime are you housed there?

A Aggravated robbery with the use of a firearm.

Q When were you arrested for that crime?

A November 28, 1995.

Q And when were you convicted of that crime?

A October 31, '96.

Q In what county were you convicted?

A Putnam County.

Q And who was the presiding judicial officer? Who was the judge?

A Mr. Spaulding.

Q Now, "I want to turn your attention to the pretrial, before the trial occurred. Do you remember what medications you were on at that time?

A Yes. I was on a stronger dosage than was in there. I was on 100 milligrams of the Mellaril.

Q Okay. What other drugs were you on?

A I was on Trazodone, and the Prozac, something like that. They had me on several different medications. That slowed my thinking down.

Q Okay.

MR. BELLOMY: I'll represent to the Court that's the first time I've heard of 100 milligram dosage of Mellaril, so I don't want them to think --

Q So what other drugs were you on?

A On the Trazodone, Desyrel and the Prozac, I think it was. I'm not exactly sure, it's been so long ago.

Q And who administered these drugs?

A Dr. Thistlethwaite, a psychiatrist at the South Central Regional Jail.

Q And do you remember what effect these drugs had on you?

A Yeah. They were making me real foggy-minded. I couldn't think straight. I was sleepy all the time.

Q How long were you on those drugs before the trial?

A Before the trial for close to a year.

Q Did you ever alert the doctor or the psychiatrist as to the side effects?

A No, I didn't.

Q And why not?

A They usually say there's certain side effects when you take your medication because I have trouble without

it, but the dosage they had me on at the time, I was very foggy-headed at the time, drowsiness, sleepiness.

Q So do I understand your testimony to be that you were drowsy and confused during that time?

A Yes, sir, I was.

Q When I say during that time, did that include your trial, also?

A Yeah, mostly during my trial.

Q How did that affect your defense?

A Well, that affected my defense a lot because I talked to my previous attorney and we had talked about going to trial and stuff and then I wanted to go to trial and then he decided for me to take --

Q Let me interrupt you, Mr. Breeding, I think you're jumping ahead a little bit. How did the fact that you were confused and you were drowsy affect you at trial? How did it affect your defense at trial?

A It affected me very bad, bad decision.

Q Were you able to help in your defense?

A No.

Q And why not?

A Because the medications had me so drowsy I couldn't concentrate on doing anything.

Q So were you able to listen to the witnesses?

A Pardon me?

Q Were you able to listen to the witnesses?

A Yeah, I could listen to them but I couldn't make much out of what was going on.

Q And were you able to talk to your defense counsel?

A I talked to him very briefly.

Q Let's actually move on to trial now -- I'm sorry. Let's concentrate on pretrial again. How many times did you meet with your counsel?

A About three times in 14 months.

Q And how many times did you meet with your counsel's investigator?

A One time.

Q Now during these meetings with Mr. Courtright, what were you led to believe, if anything?

A I was led to believe that he was a good trial lawyer and that we would go to trial and I'd have a good chance on winning the trial.

Q And during those meetings, what trial strategy developed?

A Well, the trial strategy that he came up with was go on mistaken identity and they had a photo array picture of me and some other people and that was presented in Court, and they also had a film.

Q Is that the trial strategy you wanted to pursue?

A No. I wanted to go on my mental history. I've had a bad mental past since 1973.

Q Did you tell Mr. Courtright that?

A Yes, I told him that. I tried to get him to get all my medical records of the past, all the hospital and places I had been into.

Q Did Mr. Courtright obtain those records?

A I'm not sure.

Q What about the records from Ravenswood, did he obtain those?

A No.

Q When you were in Ravenswood, do you recall what diagnosis you received?

A I was diagnosed as a schizophrenic.

Q Were you diagnosed also with some drug and alcohol dependency?

A Drug and alcohol dependency, bipolar, and anti-depressant.

Q I want to be sure, is it your testimony today that you did not want to proceed with the mistaken identity defense?

A No, I didn't.

Q Did you so instruct Mr. Courtright?

A Yes, I did.

Q And what defense did you instruct Mr. Courtright you wanted to use?

A I wanted my medication records be brought out and we would go from there. The records were never

produced. I got a little 20 minute evaluation by Dr. Dan Thistlethwaite and that was it. They said the paperwork was lost or something and we never got to finish the proper examinations and stuff.

Q Also looking pretrial, was a competency hearing -- did you have a competency hearing?

A No.

Q Why not?

A That was due to my lawyer, I think. I should have been presented with a competency hearing.

Q Did you request a competency hearing?

A Yes, I did.

Q You told Mr. Courtright you wanted a competency hearing?

A Yes.

Q Why did you want one?

A Because of the past medications and the problems I had suffered at the time for twenty-some years. And that was never done.

Q Now, I believe you asked for Mr. Courtright to suppress a photograph also, did you not?

A Yes, I did.

Q Would you tell the Court about that?

A Well, this photograph comes from out of the trunk of my car illegally by a state trooper. I had asked to suppress the photo array ID and that wasn't done. It was brought out in Court.

Q To your knowledge did Mr. Courtright investigate that claim?

A No.

Q But you did advise him of it?

A Yes. Because it was a photo from my house, a picture of me in street clothes, not jail attire or anything, and it kind of stuck out in the photo array.

Q Let's move on to trial now, Mr. Breeding. Okay? You have alleged that Mr. Courtright failed to investigate for your defense, is that correct?

A Yes, sir.

Q How did that failure to investigate affect you at trial?

A Well, it affected me at trial because he wasn't prepared. He was real nervous, shuffling papers, shuffling around. He didn't do a very good job on the investigations or anything.

Q And as a result of that, did that lead you to a conclusion?

A Yes. The conclusion, that I ended up with a 75 year aggravated robbery charge.

Q No, sir. I believe you've told me previously, did you give up hope in the trial?

A Yes.

Q What defense was actually presented at trial?

A The mistaken identity.

Q And once again, is that the defense that you wanted to present?

A No, sir, it wasn't .

Q Would you describe for the Court Mr. Courtright's performance at trial?

A Well, he was very nervous, shuffling papers around. Didn't seem competent at all.

Q Now, I've explained to you that we have to show that you were prejudiced by Mr. Courtright's ineffective assistance
of counsel, have I not?

A (Nodded head affirmatively).

Q You need to answer for the court reporter?

A Pardon?

Q You and I have discussed that we need to show prejudice by Mr. Courtright's ineffective assistance, is that correct?

A Yes, sir.

Q And would you explain to the Court how you were prejudiced at trial?

A How I was prejudiced at trial?

Q Yes?

A Was because of the way he was handling the situation.

Q Would it be fair to say that your decisions were not informed at trial?

A No, sir, they wasn't.

Q And was that lack of an informed decision based upon his failure to investigate?

A Yes, sir.

Q You've also testified that the defense that was presented was not the one that you wanted, is that correct?

A Correct.

Q Why was that defense presented over your wishes?

A Well, I don't have any idea where they come up with the picture that was taken out of the trunk of my car and all of a sudden they want to use -- Mr. Courtright wanted to use this defense of mistaken identity. I didn't want to go with that. I wanted to go with my medical problems.

Q Were you convicted at trial?

A Yes, sir.

Q Let's move on to sentencing. At sentencing -- No, I'm sorry, let's move on to pre-sentencing but post-trial. Were you interviewed by anyone?

A Yes. This woman interviewed me without my right of an attorney.

Q When you say this woman, who was this woman?

A I don't remember her name right off hand.

Q What did she do for a living?

A She was a probation officer or something.

Q And was your attorney present?

A No, sir.

Q Did you make a statement to her during that interview?

A Yes, I did.

Q What did you tell her? Well first of all, what was her question to you?

A Well, she wanted to know if I actually shot somebody in the armed robbery, and I said, "No, I

wouldn't. I might have hit the guy in the head or something." I was just saying that to try to help myself, because I was scared. I wouldn't have bothered anybody.

Q Haven't you told me previously that you were presented with two options; one was, would you have shot the man, the clerk? Or the second, would you have just hit him?

A Yes.

Q That's the way the question was presented to you?

A Yes.

Q Would you agree with me that that question presents violence no matter which way you choose?

A Yes, sir.

Q To your knowledge, was that statement ever made known to the sentencing judge?

A Yes, it was.

Q And how do you know that?

A Because the judge said "the cat's out of the bag."

Q And how did Mr. Courtright rectify that problem once the cat was out of the bag?

A He didn't seem very interested in it.

Q Did he move for a new sentencing judge?

A No.

Q What did he do?

A He didn't do anything.

Q Didn't he move to have that portion stricken from the presentence investigation?

A No, sir, I don't think he did.

Q Would you be surprised to know that I've got the record and that's what did happen?

A (No response).

MR. BELLOMY: Your Honor, may I have just a moment?

THE COURT: Uh-huh.

MR. BELLOMY: Your Honor, that's all.

THE COURT: Mr. Sorsaia, you wish to inquire?

MR. SORSAIA: Thank you, sir.

CROSS-EXAMINATION

BY MR. SORSAIA:

Q Mr. Breeding, you've been in prison what, about six years?

A Yeah, about six years four months.

Q Mr. Breeding, are you on any kinds of medications now?

A Yeah, I'm on medications now but not that much.

Q Can you tell us what medications you're on now?

A I'm not even sure.

Q You're not?

A No, sir.

Q How many pills do you take a day?

A I'm not sure of that.

Q Do you take pills every day?

A Yeah, I take some every day.

Q Okay. And do they give you these pills at Mount Olive?

A Yes, they give me medications there.

Q And do you get the pills -- what time of day do you get those pills?

A Breakfast, lunch, supper and bedtime.

Q So you get pills breakfast, lunch, supper and bedtime, is that right?

A Yes, sir.

Q So that's four times a day. And you're telling this Court that you don't know what those pills are, is that correct?

A I don't know the names of all of them. They've got me on several different ones.

Q Do you know the names of any of them?

A Well, they got me on a couple different back medications. I've got bad problems with my back. And I

think they give me Trazodone and Tegretol and Benadryl.

Q What are those for?

A I don't know.

Q Mr. Breeding, have you, since you've been at Mount Olive, have you suffered from any kind of depression or have you been given any medications for any kind of psychological or emotional problems while you've been at Mount Olive?

A Yes, sir, I have.

Q And are you on those medications currently?

A Not like the ones I used to be on.

Q But are you on those medications currently?

A Yes, I'm on medications currently.

Q Can you tell the judge how you're feeling today?

A I feel good today.

Q Do you know what's going on in this courtroom?

A Yes, I do.

Q And have these medications in any way interfered with your ability to understand what we're doing here today?

A No, sir, it hasn't.

Q Are you on the same medications that you were on when you were at South Central Regional Jail?

A No, sir, I'm not.

Q What was the date that you were accused of committing the aggravated robbery? Do you remember what the date was of that?

A November 28th, '95.

Q So it was on November 28th, '95, that was the date that you were accused of the armed robbery, is that correct?

A That's the day I was arrested.

Q Okay. Was that the day that you were accused of the -- When was the armed robbery that took place that you were accused of committing?

A Excuse me?

Q When was the armed robbery committed that you were accused of committing?

A I don't know, maybe a week before that time.

Q Okay. But you remember specifically that you were arrested on November 28th, '95, right?

A Yes.

Q And what was your trial date?

A I don't remember.

Q Did you just tell Mr. Bellomy it was October 31st, '96?

A Oh, when I went to trial, yeah. Yes, it was October 31st, '96.

Q You remember what day of the week that was?

A No, I don't.

Q Do you remember where that trial was, what building it was in?

A It was here in Putnam Count in the old building or something.

Q It was the old building right over on the hill here, on the courthouse hill?

A Yeah, I think so.

Q And you remember the judge as being Judge Spaulding, is that correct?

A Yes, sir.

Q And that is the judge that we have here today, correct?

A Yes, sir, it is.

Q Do you remember who the court reporter was?

A No.

Q Is it the same lady that's here today?

A It could have been, I'm not for sure.

Q You were arrested in '95, November of '95, and you went to trial October 31st of '96. You were in jail almost a year, isn't that correct?

A Yes, sir, it is.

Q And you told Mr. Bellomy that, in response to one of his questions, that you were on those medications for almost a year, is that correct?

A Yes, I was.

Q And did you -- Is it your testimony that you were, that you had the side effect -- Did you have side effects from these drugs?

A Yes, I do.

Q And you told Mr. Bellomy, in response to one of his questions, that you were kind of foggy-minded, is that right? That is the words you used?

A At that time of the trial, yes, I was.

Q Matter of fact, you said you-were foggy-minded for that whole year while you were on those drugs? It was that way the whole time?

A Yes.

Q So when you met with Dr. Thistlethwaite and Dr Clayman, when they did the evaluation, you were foggy-minded at that time too, is that correct?

A Yes, that's correct.

Q And you had the effects of those drugs while you were seen by Dr. Thistlethwaite and Clayman?

A Yes, sir.

Q Let's talk about how you were feeling when you were at the trial. Tell us in what ways did these drugs affect you during the day of your trial?

A They made me like sluggish and slow thinking. I couldn't think as fast as I can today.

Q Okay?

A I wasn't generally aware of what was going on that much during the trial.

Q You weren't?

A No, sir, I wasn't.

Q So you're saying you weren't aware of the details and the specifics that happened at your trial?

A No, sir, I wasn't.

Q Let's talk about your trial, Mr. Breeding. What happened with this photo array? You remember the photo array?

A Yeah, something about --

Q I understand it's been six years, right? It's been a while?

A (Nodded head affirmatively).

Q Let's talk about the photo array. What happened in this photo array during this trial? Did they use a photo array?

A I think so. I'm not sure.

Q What's the complaint about the picture taken out of your trunk?

A Well, I was arrested on a DUI and the state police went and took a picture out of my trunk and he was keeping it over his sun visor of his car, saying I sent this guy back to prison, and if he ever gets out again, I'll send him back again. Like when he would pull someone over, say "do you know this guy, Grover Breeding?" And that's where the picture come from. It wasn't a photo picture from the jail or corrections or anywhere like that.

Q Was this a West Virginia State Trooper that said this?

A Yes, it was.

Q Did he testify in the trial and say that?

A No, he didn't.

Q He didn't?

A No.

Q Was that picture used in this trial?

A It come out of the trunk of my car out of a photo album.

Q But was it used in the trial? Did the jury --

A Yes.

Q Did the jury see that picture during the trial?

A Yes.

Q And who was the witness that showed them that picture?

A Some kid that I was supposed to have robbed at the store or something.

Q I'm sorry?

A Some kid.

Q Oh, did they have the kid that was in this convenience store, did he testify?

A Yes, he did.

Q Okay. And was it a male or female?

A Male.

Q And about how old was he, do you remember?

A Young. I'm not for sure.

Q Would you say he was about what, 15? 16? 17?

A I don't know.

Q Younger than me? I'm 44.

A Yeah, I'd say. younger than you.

Q Say twenties, if you can remember?

A I don't remember.

Q But you remember he was a young boy, right?

A Yeah, yes.

MR. BELLOMY: Your Honor, I'm sorry to interrupt. I'd like the record to reflect he paused to contemplate each one
of those answers about --

THE COURT: The record will reflect there was a pause.

Q Okay. Who was the investigating officer in this case, do you remember? Was it a trooper or a deputy?

A I don't remember, it's been so long ago.

Q Do you remember, did any law enforcement testify in your trial against you regarding the suppression issue of this photograph?

A No, I don't remember.

Q Did they play -- You testified they played a film in your trial, a video? When Mr. Bellomy asked you a question you said they played a film?

A I don't know what I was talking about there. I get a little nervous.

Q Well, you told Mr. Bellomy that they played a film. They had a film in your trial, is that right?

A I must have made a mistake. I don't know what I was talking about.

Q You don't know what you're talking about today? I mean, were you mistaken today about that? I'm just trying to understand, Mr. Breeding --

MR. BELLOMY: Your Honor, I'm going to object. I don't remember him testifying that there was a film.

MR. SORSAIA: Well, I have it in my notes something about a film.

THE COURT: Gentlemen, I think what he was referring to, they had a videotape at the store when the robbery went down and I thought he referred to -- I don't know whether he called it a -- They had a videotape of the alleged robber. I thought that's what he was referring to.

MR. SORSAIA: According to my notes he called it a film. That's why I said film.

THE COURT: I'm not sure. You can follow up as to what he was talking about.

Q Mr. Breeding, let me ask you this: During your trial, did they play a videotape taken from the convenience store showing a robbery?

A I think they did.

Q And did you watch the tape?

A Not really.

Q Did they play it on a T. V.?

A Yeah, they played it on a T. V., or something, I'm not sure.

Q And did the jury see it? They played it to the jury?

A I'm sure. I guess they did.

Q Did your lawyer ever discuss with you this film or this videotape, the existence of it?

A It's been so long ago, I don't remember.

Q Well, your lawyer discussed with you that your defense was going to be mistaken identity, is that correct?

A Yes, that's correct.

Q And isn't it true that the mistaken identity would be that the person in that videotape isn't you, would that be a mistaken identity defense? Is that how you remember it coming down?

A I'm not for sure.

Q Did your lawyer cross-examine the young boy about whether or not he could identify you as being the man that robbed him, do you remember that?

A No, sir, I don't.

Q You wanted to defend yourself based on your past mental history, is that what you're saying?

A Yes.

Q You met with Dr. Thistlethwaite when the Court ordered an -evaluation, isn't that correct?

A That was correct.

Q And when you met with Dr. Thistlethwaite you were on those medications that we discussed here a little earlier, is that right?

A Yeah, I was on medications, yes, sir.

Q Now there may be more than one Dr. Thistlethwaite. Was the Dr. Thistlethwaite that treated you at the jail different than the Dr. Thistlethwaite that did the evaluation, do you remember?

A I don't remember.

Q Well, the fellow that did the evaluation was Daniel Thistlethwaite, is that correct?

A I think that was his name. I'm not good at names.

Q And when you met with Dr. Thistlethwaite, you described to him a long history of psychiatric illness, beginning approximately in 1973, is that correct?

A That's correct.

Q And you described that at the age of 21 you had a nervous breakdown, is that correct?

A That's correct.

Q You told Dr. Thistlethwaite that, right?

A I guess.

Q If I told you it was in his report, would you have any reason to disagree with that?

A No, I wouldn't.

Q You reported that you told Dr. Thistlethwaite that you were treated in an inpatient psychiatric hospital called Ravenswood which was located in Chicago, Illinois, is that correct?

A That's correct.

Q You told them, you told Dr. Thistlethwaite that you had symptoms consistent with psychotic depression including depressed mood, paranoia, thoughts of suicide. That was in your history, wasn't it?

A That's correct.

Q And you told Dr. Thistlethwaite that, correct?

A If it's on that paper, I guess I did. I can't remember that long ago.

Q You told Dr. Thistlethwaite that you had subsequent treatment after a suicide attempt approximately 15 years prior to this evaluation?

A I suppose so.

Q You reported to Dr. Thistlethwaite that there was a time in your past that you overdosed on medication and you were hospitalized at CAMC General, is that right?

A I think so.

Q You told Dr. Thistlethwaite you'd been in and out of Shawnee Hills for many years?

A Yes, I have.

Q And you told him, including that you had treatment at Threshold Drug and Alcohol Treatment Center, right?

A I can't remember. I've been in so many of them.

Q Well, you were able to tell Dr. Thistlethwaite about that, didn't you?

A I guess if it's written on the paper, I told him.

Q Well, do you remember talking to him about -- Do you remember talking to Dr. Thistlethwaite about your psychological background and your history?

A I can vaguely remember.

Q Okay. You reported that you were treated by Dr. Knapp in Charleston for quite some time as an out-patient, isn't that correct?

A I'm not sure. I've seen so many psychiatrists over the years.

Q You told Dr. Thistlethwaite that you received antidepressant and antipsychotic medication. You told Dr. Thistlethwaite that you had a history of being treated in the psychiatric ward at Moundsville for approximately

six months, I guess maybe on another aggravated robbery, is that correct?

A What does that have to do with what we're --

Q Answer my question, sir. Did you tell Dr. Thistlethwaite that?

A I don't remember.

Q Well, you were on this medication that you're complaining about when you were evaluated by Dr. Thistlethwaite, isn't that correct?

A I was on some type of medication, but I've been on so many different types over the last 29 years, I'm not exactly sure what they all were.

Q Well, sir, when you were at South Central Jail you were on the medication that you said made you foggy-minded, is that correct?

A That's correct.

Q And during that time period you were evaluated by Dr. Thistlethwaite, isn't that correct?

A That's correct.

Q And during that evaluation you were able to describe in detail your psychological and medical history as I just read, isn't that correct?

A Well, that's after they have given me --

Q Yes or no, sir. Isn't that correct?

A That's correct.

Q And you were able to do it in very minute detail, despite the fact that you were foggy-minded, right?

A I don't remember what all I told him. You're reading that off a paper or something for six years ago.

Q Okay. Do you remember during the course of the trial the opening statements? You're talking about that there was an argument, the defense was going to be mistaken identity, right?

A Yes, that was right.

Q And is that the defense that your defense lawyer put on, mistaken identity?

A Yes.

Q And did he tell the jury that in opening statement?

A I'm not sure.

Q Did he tell -- Do you remember the closing arguments?

A No, sir, I don't.

Q Is it that you don't remember or you don't want to remember?

A I don't remember.

Q But you do remember that he didn't do what you wanted. You do remember that it was a mistaken identity defense, isn't that correct?

A That is correct.

Q Okay. And you do remember that that's the defense he put on in the trial or attempted to put on?

MR. BELLOMY: I'm going to object. That's been asked and answered.

THE COURT: Agreed, asked and answered.

Q Do you remember the Court instructing the jury as to the law?

A I don't remember, it's been so many years ago.

Q Let's talk about -- Let me ask, how did you think your lawyer did in the trial? What did you observe? How did he do?

A I don't think he did that good.

Q Okay. Now tell me, it's important, tell us why do you think he didn't do that well in the courtroom? Now we're talking about the trial. Why did he not do well?

A Because he seemed real nervous, agitated, was fumbling around with his papers, dropping papers, he was real nervous.

Q And you remember that?

A I can remember certain points of the trial here and there. It's been over six years ago. I can't sit here and say I remember everything and I can't.

Q Now, let me just make a list here again. What did he do? He fumbled with papers, right?

A Yes.

Q All right. And what else?

A Just seemed nervous and agitated.

Q And how did you know he was nervous and agitated? Forgive me for asking silly questions, but how did you know he was nervous and agitated?

A Because I was watching him.

Q And what kind of demeanor or gestures did he do that indicated to you that he was nervous or agitated?

A Just the way he was acting.

Q Did he indicate that to you in the way he talked to you or discussed those things with you?

A Yeah, he seemed nervous in his voice. He didn't seem confident.

Q When he was talking to you?

A Yes, sir.

Q What was he talking to you about when he looked like he was nervous or agitated?

A He was talking something about the trial, but it's been so long ago I can't remember everything.

Q I know, but if you can tell me?

A I can't remember all that.

Q So you're saying he fumbled with his papers and he was nervous and agitated. And what else should I put on the list that indicated to you he wasn't doing a good job?

A He seemed like he wasn't confident.

Q Confident?

A Yes, confident.

Q What gave you that idea?

A I just answered that question, sir.

Q And that's because he was nervous, agitated and fumbled around, right?

A Right.

Q Did he ever indicate to you that he thought he was going to have a hard time in this defense due to the fact he had that videotape?

A No.

Q I mean, that's basically what they did, wasn't it? They played a videotape and the jury looked at the videotape?

A I think there was some kind of film or something being watched, but I've done answered that two or three times.

Q Sir, do you know, do you have a reason why you -- What do you think happened in that trial that got you convicted? What evidence was there that got you convicted?

A I'm not sure.

Q Sir, what made you think that a psychological defense would have been of some success for you?

A Because I'd had psychological troubles for years.

Q Okay. Now, you knew that Dr. Thistlethwaite and Dr. Clayman wrote a report saying that you were competent to stand trial and that you were criminally responsible, so what was your feelings about that? Did you think they were wrong?

A I don't remember, it's been so long ago.

Q So you don't know if they were wrong or not?

MR. BELLOMY: Your Honor, I'm going to object. That's asking for a psychological opinion that my client is not able to render.

MR. SORSAIA: Your Honor, he's saying that he thought his lawyer made a mistake by not challenging the competency evaluation, and if he has that opinion I think I'm entitled to know why he thinks that.

THE COURT: I would agree. You may continue.

Q What makes you think Dr. Clayman and Dr. Thistlethwaite were wrong?

A I didn't say anything about them being wrong.

Q So I guess my question, and sir, I don't know if I expect you to know if they were wrong, I just -- Do you have a reason out there to think that they were wrong?

A There's a possibility.

Q But do you know if they were wrong?

A I'm an inmate, I'm not a psychologist or a psychiatrist.

Q So you don't know that they were wrong?

A I'm just saying I don't know.

Q So what makes you think if your lawyer would have put on an insanity defense, that the outcome would be any different in this case?

A It should have come out a lot different.

Q Why?

A Because like I have said several times, I've had a lot of psychological problems over the years, been in hospitals and prisons all my life.

Q Okay. And so is that your opinion why you think that you're not criminally responsible for this alleged crime?

MR. BELLOMY: And I'm going to object to that question, Your Honor. I don't think anyone has challenged criminal responsibility here.

THE COURT: The Court will sustain the objection.

MR. SORSAIA: Okay. You're not challenging criminal responsibility?

MR. BELLOMY: I don't believe so, Your Honor. I believe what we're challenging is the constitutionality of the conviction itself.

THE COURT: Okay. So assistance of counsel was an issue.

MR. BELLOMY: Assistance of counsel and competency to stand trial because of drug usage. And then of course, we have a legal matter that we're going to take up later which is the excessive sentence. But the actual challenging --

THE COURT: I understood from your brief, you were talking about a total blackout, had no memory of the event, et cetera. I just want to be clear then, we're not looking at criminal responsibility?

MR. BELLOMY: No. I was under the impression at our last hearing that I had agreed and stipulated that that was part of ineffective assistance for not challenging that.

MR. SORSAIA: See my problem, Your Honor, was that the allegation was it was ineffective assistance not to have a hearing on this report. So I'm assuming now it's just been narrowed to competency.

THE COURT: That's what I'm getting from counsel. In other words, that the complaint was we didn't have a hearing, he should have, to challenge only effective assistance of counsel, not the initial finding of criminal responsibility?

MR. BELLOMY: Once again, yes, that's correct.

THE COURT: Then your objection is correct, and I would sustain it then.

Q Mr. Breeding, do you have -- Dr. Thistlethwaite and Dr. Clayman said you were competent to stand trial, is that correct?

A That's correct.

Q Okay. Do you believe that they were right or do you believe that they were wrong?

A Like I said, I don't know. I'm not a trained psychologist or psychiatrist. They sent me there for an evaluation, I took the evaluation. They was supposed to give me a further one that never happened.

Q Okay. So are you aware of any reason why your lawyer should have -- Are you aware of a reason why your lawyer should have challenged Thistlethwaite and Clayman's finding that you were competent to stand trial?

A No.

Q Did you ever mention to anybody during the course of the trial that you had problems comprehending what was going on?

A No, I didn't, but I should have.

Q Are you aware of any reason why your lawyer should have known that you were having a problem?

A Yes, he should have known. I should have spoke to him about that.

Q Sir, did you take the stand in your trial?

A No.

Q Okay. When you elected not to take the stand in your trial, did you have a -- Were you advised that you could take the stand or couldn't take the stand?

A I don't remember.

Q Did you have any problem walking that day?

A Yeah, I was counting a weak leg or something, dizzy.

Q That building over there doesn't have an elevator, did you have to go up the stairs? Did you walk up the stairs over there?

A I think so.

Q Did you have any problems walking up the stairs?

A I can't remember that much about it.

Q Sir, before you were arrested, were you on any kind of medications?

A No. I was on abusing drugs and alcohol heavily.

MR. SORSAIA: Thank you, sir. Thank you, Judge.

THE COURT: Mr. Bellomy?

MR. BELLOMY: Yes, thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. BELLOMY:

Q Mr. Breeding, in responding to the Prosecutor's questions you testified that you were arrested on 11/28/95, is that correct?

A That's correct.

Q You also testified that your trial date was 10/31/96, is that correct?

A Correct.

Q Now, how many times have you discussed this case with your paralegal in prison?

A Probably fifty times.

Q How many times have you discussed this case with me?

A I can't count the times.

Q So, would it be fair to say you remember those dates because you've reviewed this Court record many times?

A Yes. I went over the transcripts and over them.

Q Now, the Prosecutor also asked you about, I believe the question was, was there any reason why the evaluation by Dr. Thistlethwaite might be wrong. Do you remember him asking that question?

A Yes, I do.

Q I believe your response was no, was it not?

A Yes.

MR. BELLOMY: Your Honor, may I approach the witness?

THE COURT: Uh-huh.

Q Do you recognize this document, sir?

MR. BELLOMY: I did ask to approach, didn't I?

THE COURT: Uh-huh.

MR. BELLOMY: Thank you.

THE COURT: If you didn't, you may.

A Yes, I think so.

Q Isn't that Dr. Thistlethwaite's report?

A Yes, I believe it is.

Q I've marked this paragraph right here. Would you read it please?

A I am aware that there are multiple medical records that have not been made available as of yet for review. We will certainly review these in detail and if any change in opinion is forthcoming, we will certainly notify the appropriate authorities immediately."

Q Isn't that the reason, to obtain those records, sir?

A Yes, sir, it is.

Q Is that the doctor said there could be a change in his opinion –

A Yes.

Q --once those records were obtained. So is that the reason he may have been wrong?

A Yes.

Q Now, also the Prosecutor asked you would your trial have been different. Did you instruct -- or no, let me change that. I'm leading, I apologize. What defense did you instruct Mr. Courtright to use?

A On my previous mental health problems that I've had ongoing since 1973.

Q Do you feel foggy today?

A I don't.

Q Where did you spend the weekend? Where did you spend the weekend?

A At the South Central Regional Jail.

Q What medications were you given over the weekend?

A Just a couple back pills and some Benadryl.

Q I want to make sure the Court understands. How did you feel during trial?

A I felt real paranoid and not fully aware of what was going on at the time.

Q Paranoid?

A Yes, real paranoid.

Q You testified earlier you were drowsy?

A Yeah. Yes, I was also drowsy.

Q Now, as I understand what you have alleged, you don't allege a different outcome, do you, would have been obtained at trial?

A No.

Q You allege that your instructions were not followed, is that correct?

A That's correct.

Q As the competency hearing goes, why did you request Mr. Courtright to get you a competency hearing after this report came in?

A Because I'd had problems for years in the mental health illness and I thought we were going to see another doctor, like Thistlethwaite said, if we need to see him again and get another evaluation could be necessary done, but no one followed through to do it.

Q Now, I want to turn our attention to that photo the Prosecutor asked you about. Is it your contention that photo was illegally obtained?

A Yes, sir.

Q Did you so tell Mr. Courtright?

A Yes, sir.

Q Did he investigate?

A No, sir.

Q Did he do a Motion to Suppress the identification based on an illegally obtained photo?

A No.

MR. BELLOMY: Your Honor, that's all I have.

THE COURT: Mr. Sorsaia.

RECROSS-EXAMINATION

BY MR. SORSAIA:

Q You wanted Mr. Courtright to create a defense based around all the problems you've had in the past with your psychological history, isn't that right?

A That's correct.

Q And the reason you wanted him to do that was because you understood what was at stake here, right? I mean, you knew you were in trouble?

A Yes, I knew I was in trouble.

Q Right. And you wanted a, you wanted a defense? I mean, you didn't want to come in here and not put on a defense, isn't that correct?

A Pardon?

Q You wanted a good defense, right?

A Yes, I wanted a good defense.

Q And you understood in your mind a good defense was this psychological defense based on your history, isn't that correct?

A That's correct.

Q And that's because you understood the law, or I mean, you thought you understood the law in that regard? I mean, to you, that was a legal defense, right?

A Yes, it was.

Q And you were frustrated because your lawyer didn't do that?

A I didn't like the way things were going.

Q Right. You were frustrated because your lawyer didn't put on the legal defense that you wanted, right?

A Right.

Q And you attempted to work with him to formulate an appropriate defense, right?

A Right. Oh, pardon?

Q You worked with him to try to formulate an appropriate defense?

A Right, yes, sir.

Q He just didn't do what you wanted him to do, right?

A Right.

Q And the defense that you advocated was based upon what you thought in your mind, you know, was the law regarding mental defenses, right?

A Right.

MR. SORSAIA: Okay. Thank you.

MR. BELLOMY: Nothing else.

THE COURT: Mr. Breeding, prior to coming to this hearing today and in the preparation of your petition, your habeas corpus petition, did Mr. Bellomy review with you all of the possible rights that you could assert?

THE WITNESS: Yes, sir, he did.

THE COURT: And he filed with the Court a document, and I'll let you look at it, it's a checklist of grounds and it lists grounds that you're asserting and grounds that you were not asserting. One of the requirements that I have to make sure of is that Mr. Bellomy in fact did go over with you all the possibilities, and that you and he have asserted them in this particular proceeding here today.

THE WITNESS: Yes, sir.

THE COURT: And have you in your brief, in your petition, asserted all of the grounds that are relevant?

THE WITNESS: Yes, sir, we did.

THE COURT: And if you did not assert the grounds, you're waiving or giving up any complaint about those matters.

THE WITNESS: Yes, sir, I understand that.

THE COURT: Then the Court would make a finding as required that counsel did in fact review with Mr. Breeding all possible grounds in this case and the Court specifically finds that Mr. Breeding was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding and he has in fact done so in this proceeding.

The defense that was presented at trial was essentially the kind of defense that said "I didn't do it, the clerk is mistaken, I'm not guilty." Now did you disagree with that defense?

THE WITNESS: Yes, I disagreed with the defense.

THE COURT: So you what, believed yourself that you were guilty?

THE COURT [WITNESS]: Your Honor, I could have been, but I was on drugs and alcohol and I had a blackout and I've been in the penitentiary six years, I've rehabilitated myself, I'm taking all the necessary classes. I hold down a job up there in the penitentiary. I've been doing well. And I'm trying to get out as soon as possible.

THE COURT: And I'm just trying to go back and look at the trial, okay? And in the trial the defense was "I'm not guilty. I didn't do it, and they're mistaken if they say I did it." And so I'm trying to understand, if you would put on a mental defense, then a mental defense is basically saying "Gee, I'm guilty, but, you know, I had some mental problems in doing that." You preferred, now looking back on it, you would have preferred a defense that said basically you were guilty but you had these mental problems that caused it?

THE WITNESS: Yeah, I guess I could have did that because I have had a lot of severe mental problems.

THE COURT: I'm just trying to understand if you disagreed with Mr. Courtright.

THE WITNESS: Yes, sir.

THE COURT: You know, to put on a mental defense means, you know, if -- If you were not guilty, if you didn't do it, then you wouldn't need to put on a mental defense, you didn't do it. So you would have preferred a mental defense as opposed to the kind of defense that says "I'm not guilty, I didn't do it."

THE WITNESS: Yes, sir, Your Honor.

THE COURT: Okay. Mr. Bellomy asked you -- Well, first he called the pharmacist, the lady who testified, and she testified about Mellaril, Desyrel, and Prozac and the effects of those drugs.

THE WITNESS: Yes, sir.

THE COURT: She had indicated based upon Mr. Bellomy's questions as to some of the side effects of 15 milligrams of Mellaril. Did you say you were taking 100 milligrams?

THE WITNESS: Yes, Your Honor, it was 100 milligrams.

THE COURT: Were they correct in saying you were taking the 50 milligrams of Desyrel?

THE WITNESS: Yes, Your Honor, that's correct.

THE COURT: And were they correct though on the Prozac that at that time you were taking 20 milligrams of Prozac?

THE WITNESS: Yes, Your Honor, I think that's correct.

THE COURT: Now you also mentioned Trazodone.

THE WITNESS: Well, it's the same thing as Desyrel.

THE COURT: Were you taking the Trazodone then at the time of the trial?

THE WITNESS: I think so.

THE COURT: How are you able to remember specifically the medications and the dosages you were taking six years ago, but you can't remember the dosages and the medicines you're taking right now, what you took yesterday? How come your memory is so good on the dosages six years ago but not so good on what you're doing right now, if now you're thinking clearly?

THE WITNESS: It is because they cut me back on a lot of medicines and stuff like that, so I could think clearly and not be walking around like a zombie all the time.

THE COURT: So you're thinking more clearly now?

THE WITNESS: Yes, Your Honor, I am.

THE COURT: But you can't remember the dosages of what you're taking now?

THE WITNESS: No, sir, I can't.

THE COURT: But you can remember specifically that you were taking 100 milligrams of Mellaril back then, when the reports show that you were only taking 15 milligrams?

THE WITNESS: I'm pretty certain that it was 100 milligrams. It was a big red pill.

THE COURT: And I guess my question is, if back then you were foggy and weren't remembering, how can you say you were taking 100 then, if you can't even know what you took yesterday?

THE WITNESS: I don't know.

THE COURT: I have no other inquiry in light of the Court's inquiry -- I have no other inquiry. Do you all have any inquiry in light of the Court's inquiry?

MR. BELLOMY: No, Your Honor.

MR. SORSAIA: No, Your Honor.

THE COURT: Thank you, Mr. Breeding, you may have a seat.

Thereupon the witness was excused.

STATE OF WEST VIRGINIA,
COUNTY OF PUTNAM, to-wit:

I, Judith A. Greene, Official Reporter for the Circuit Court of Putnam County, West Virginia, do hereby certify that the foregoing is a true and correct transcript of the testimony of Grover Breeding as given in the Omnibus Habeas Corpus hearing had in the matter of Grover Lee Breeding, petitioner, versus Howard Painter, Warden, respondent, Case No. 99-C-123, on Monday, April 1, 2002, as reported by me in stenographic notes.

Given under my hand this 16th day of April, 2002.

s/_____
Official Reporter, Circuit Court of
Putnam County, West Virginia

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JUDITH A. GREENE
7801 ROUTE 34
WINFIELD, WV 25213
My Commission Expires July 2, 2008

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

GROVER LEE BREEDING,
Petitioner,

vs. Civil Action No.: 99-C-123

HOWARD PAINTER, Warden,
Respondent.

CHECKLIST OF GROUNDS ASSERTED OR WAIVED IN POST-CONVICTION HABEAS CORPUS PROCEEDING

The undersigned Petitioner, Grover Lee Breeding, by Counsel, D. Scott Bellomy, Esq., hereby executes and files the Checklist of Grounds Asserted or Waived in Post-Conviction Habeas Corpus Proceedings. The Petitioner understands that all grounds checked as waived may not be raised in future habeas corpus proceedings absent a retroactive change in the law:

1. ☒Waived ☐ Asserted Trial court lacked jurisdiction
2. ☒Waived ☐ Asserted Statute under which conviction obtained unconstitutional
3. ☒Waived ☐ Asserted Indictment shows on face no offense was committed
4. ☒Waived ☐ Asserted Prejudicial pre-trial publicity
5. ☒Waived ☐ Asserted Denial of right to speedy trial

6.	☒Waived	☐ Asserted	Involuntary guilty plea
7.	☐Waived	☒ Asserted	Mental competency at time of crime
8.	☒Waived	☐ Asserted	Mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate
9.	☐Waived	☒ Asserted	Incapacity to stand trial due to drug use
10.	☒Waived	☐ Asserted	Language barrier to understanding the proceedings
11.	☒Waived	☐ Asserted	Denial of counsel
12.	☒Waived	☐ Asserted	Unintelligent waiver of counsel
13.	☒Waived	☐ Asserted	Failure of counsel to take an appeal
14.	☒Waived	☐ Asserted	Consecutive sentences for same transaction
15.	☒Waived	☐ Asserted	Coerced confessions
16.	☒Waived	☐ Asserted	Suppression of helpful evidence by prosecutor
17.	☒Waived	☐ Asserted	State's knowing use of perjured testimony
18.	☒Waived	☐ Asserted	Falsification of a transcript by prosecutor
19.	☒Waived	☐ Asserted	Unfulfilled plea bargains
20.	☐Waived	☒ Asserted	Information in pre-sentence report erroneous
21.	☐Waived	☒ Asserted	Ineffective assistance of counsel
22.	☒Waived	☐ Asserted	Double jeopardy
23.	☒Waived	☐ Asserted	Irregularities in arrest

24.	⊠Waived	□ Asserted	Excessiveness or denial of bail
25.	⊠Waived	□ Asserted	No preliminary hearing
26.	⊠Waived	□ Asserted	Illegal detention prior to arraignment
27.	⊠Waived	□ Asserted	Irregularities or errors in arraignment
28.	⊠Waived	□ Asserted	Challenges to the composition of grand jury or its procedures
29.	⊠Waived	□ Asserted	Failure to provide copy of indictment to defendant
30.	⊠Waived	□ Asserted	Defects in indictment
31.	⊠Waived	□ Asserted	Improper venue
32.	⊠Waived	□ Asserted	Pre-indictment delay
33.	⊠Waived	□ Asserted	Refusal of continuance
34.	⊠Waived	□ Asserted	Refusal to subpoena witnesses
35.	⊠Waived	□ Asserted	Prejudicial joinder of defendants
36.	⊠Waived	□ Asserted	Lack of full public hearing
37.	⊠Waived	□ Asserted	Nondisclosure of Grand Jury minutes
38.	⊠Waived	□ Asserted	Refusal to turn over witness notes after witness has testified
39.	□ Waived	⊠ Asserted	Claim of incompetence at time of offense, as opposed to time of trial
40.	⊠Waived	□ Asserted	Claims concerning use of informers to convict
41.	⊠Waived	□ Asserted	Constitutional errors in evidentiary rulings
42.	⊠Waived	□ Asserted	Instructions to the jury

43.	☒Waived	☐ Asserted	Claims of prejudicial statements by trial judges
44.	☒Waived	☐ Asserted	Claims of prejudicial statements by prosecutor
45.	☒Waived	☐ Asserted	Sufficiency of evidence
46.	☒Waived	☐ Asserted	Acquittal of co-defendant on same charge
47.	☒Waived	☐ Asserted	Defendant's absence from part of the proceedings
48.	☒Waived	☐ Asserted	Improper communications between prosecutor or witnesses and jury
49.	☒Waived	☐ Asserted	Question of actual guilt upon an acceptable guilty plea
50.	☒Waived	☐ Asserted	Severer sentence than expected
51.	☐Waived	☒ Asserted	Excessive sentence
52.	☒Waived	☐ Asserted	Mistaken advice of counsel as to parole or probation eligibility
53.	☒Waived	☐ Asserted	Amount of time served on sentence, credit for time served.

Petitioner,

s/_____

Grover Lee Breeding

s/_____

D. Scott Bellomy, Esq.
BELLOMY & TURNER
Counsel for Petitioner
418 8th Street, Suite 105
Huntington, WV 25701

[SEAL]

STATE OF WEST VIRGINIA
TWENTY—NINTH JUDICIAL CIRCUIT
C. SPAULDING, JUDGE

P.O. Box 402
Mason County Courthouse
Point Pleasant, West Virginia 25550
304/675-3480

P.O. Box 338
Putnam County Courthouse
Winfield, West Virginia 25213
304/588-0262

July 15, 1996

Gregory Courtright
Attorney at Law
Suite 306, Peoples Building
Charleston, West Virginia 25031

William H. Rardin
Office of the Prosecuting Attorney
Post Office Box 148
Winfield, West Virginia 25213

Re: **State v. Grover Breeding**
Putnam County Case No. 96-F-61

Gentlemen:

Enclosed is a copy of the report of the psychiatrist who evaluated Mr. Breeding. I have not received the report of the psychologist, but it will be forwarded upon receipt.

I note from Dr. Thistlethwaite's letter that he believes that I am gathering multiple psychiatric records of

previous treatment episodes of Mr. Breeding for his review. I want to be clear that I do not know anything about previous treatments and I am not gathering such records. Forwarding to Dr. Thistlethwaite these records is the responsibility of Mr. Breeding and his attorney if they deem it important for review. The prosecutor and the court are not privy to this information. Mr. Courtright needs to advise the evaluator when and if this information will be forthcoming.

Very truly yours,

s/_____
O. C. Spaulding, Judge

cc: Dr. Daniel B. Thistlethwaite
Dr. David Clayman

PsyCare, Inc. ONE PLAYERS CLUB DRIVE
Comprehensive Psychiatric Services

P.O. BOX 3546
CHARLESTON. WV 25335-3546
(304) 345,0880
FAX (304) 345-3312

June 27, 1996

Honorable O.C. Spalding, Judge
Circuit Judge of Putnam County
P.O. Box 338
Winfield, WV 25213

Dear Judge Spalding:

Please find enclosed my forensic evaluation of Mr. Grover Breeding which I completed on 6/25/96. I am aware that you are attempting to gather multiple psychiatric records of previous treatment episodes for Mr. Breeding and we await these for their review. You may note that I have already made comment as to Mr. Breeding's current competency and my belief regarding criminal responsibility. If records we review have any impact on my decision, I will notify you immediately, but I felt it prudent to go ahead and make a decision now so that you would at least have preliminary information to use in this case. I am concerned about the fact that Mr. Breeding has fairly significant depressive symptoms at this time, and I have notified the appropriate treatment staff at South Central Regional Jail to monitor him

closely. He is to be seen by the treating psychiatrist ou there as soon as it can be arranged.

Thank you very much for the referral of this gentlema for evaluation. If you have any questions regarding m report, please feel free to contact me any time.

Sincerely,

s/_____
Daniel B. Thistlethwaite, M.D.

DBT//am

Trazodone, Fluoxetine, and Thioridazine

Trazodone and fluoxetine are two medications used to treat depression. Though their mechanisms of action and dosages may vary, both medications can be used to achieve the common therapeutic goal of resolution of depressive symptoms. Thioridazine is an antipsychotic medication which is sometimes used in conjunction with antidepressants.

The mechanism of action is not fully understood with trazodone. Fifty percent of individuals on an outpatient basis exhibit a significant therapeutic response after one week of treatment. Three-fourths respond adequately after two weeks of treatment, while it takes others up to four weeks. Most common side effects include drowsiness, dizziness, fatigue, dry mouth and nervousness.

Fluoxetine is selective serotonin reuptake inhibitor. The full antident effect may not be seen until four or more weeks of treatment. Side effects most commonly seen with fluoxetine include drowsiness, dizziness, insomnia, nausea, and nervousness.

Thioridazine acts as a dopamine receptor antagonist. The medication should be titrated at 25-30% increments weekly. Full therapeutic effect is seen in six to eight weeks. The most common side effects include sedation, anticholinergic effects such as dry mouth, and orthostatic hypotension.

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

STATE OF WEST VIRGINIA

VS. CASE NO. _____
(Circuit Court of Putnam County)

GROVER LEE BREEDING

GROVER L. BREEDING'S DESIGNATION OF RECORD

Now comes Petitioner/Defendant Below, GROVER LEE BREEDING, by counsel, David L. Hill, pursuant to Rule 4C of the Rules of the Supreme Court of Appeals of the State of West Virginia, and designates the following matters of record on file with the Circuit Court of Putnam County, West Virginia, in their entirety, as necessary to prosecute the appeal of this matter:

1. Entire file of this case maintained by the Clerk of the Circuit Court of Putnam County, West Virginia.

GROVER LEE BREEDING
By Counsel

s/_____
DAVID L. HILL (WVSB #1726)
Attorney at Law
P.O. Box 506
Hurricane, WV 25526
(304) 562-2274
(304) 562-2055 *fax*